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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1973

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UNITED STATES OF AMERICA, APPELLANT

v.

GENERAL DYNAMICS CORPORATION, THE UNITED  
ELECTRIC COAL COMPANIES, and FREEMAN  
COAL MINING CORPORATION, APPELLEES

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ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS

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**BRIEF FOR APPELLEES**

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**BRIEF FOR APPELLEES**

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**QUESTION PRESENTED**

There is really only one question presented by this case:

Whether the District Court's conclusion, "upon the basis of reliable, probative and substantial evidence contained in the record," that the longstanding affiliation of two coal producers challenged in this action does not violate Section 7 of the Clayton Act is clearly erroneous. (J.S.App. 66a.)

The subsidiary questions of market definition which the Government urges as presenting additional questions for

review, while correctly decided by the District Court, were neither critical to, nor controlling of, the decision below. The District Court specifically held in this regard that no violation of Section 7 would be found "even were this court to accept the Government's unrealistic product and geographic market definitions." (J.S.App. 66a.)

The other question which the Government now states is presented was not raised in its Jurisdictional Statement. There the Government urged that this Court conduct a plenary review of the trial record to determine whether there was evidentiary support for the trial court's findings with respect to the inability of the acquired company to secure the strip coal reserves or expertise in the mining of deep coal reserves necessary for it to be a viable competitive force.<sup>1</sup> Having now taken a hard look at the record and seen that it is dead against them, Government counsel handling the appeal state that they have "shifted." They now wish to present for review—instead of the original question—the question whether the District Court tested United Electric's competitive demise at the proper time and under correct standards. Far from presenting a serious question, however, the Government's arguments on this score are nothing more than a contrived afterthought, lacking in substance and totally at odds with their position in the District Court. They should be rejected out of hand, if not disregarded completely. See Supreme Court Rule 40(1)(d) (2).

### **STATEMENT<sup>2</sup>**

The combination of Freeman Coal Mining Corporation and The United Electric Coal Companies which the Gov-

<sup>1</sup> See Jurisdictional Statement, Question 4 and pages 21-24. See also Brief for the United States in Opposition to Motion to Affirm, pp. 3-8.

<sup>2</sup> Record references to the facts summarized here appear in the Argument portion of this brief where they are discussed in (cont.)

ernment seeks to undo is nearing the close of its second decade, and United Electric itself is at the end of its competitive life. This longstanding affiliation had its inception in 1954 when the Freeman interests purchased more than 10 percent of United Electric's stock, and was formalized in 1959 when five new directors were elected to United Electric's nine-man Board, a new president was chosen as chief executive officer, and the president of Freeman became Chairman of United Electric's Executive Committee as well. The affiliation was disclosed to both the public and the Government from the outset, and in 1960 the Antitrust Division of the Department of Justice was furnished information with respect to the common stock ownership of Freeman and United Electric, but took no action. (J.S. App. 7a-8a.)

By the mid-1950's United Electric found itself faced with a critical reserve problem. While uncommitted coal reserves are, of course, the life blood of any coal producer, the company's premerger management had unfortunately not provided for its future. United Electric recognized the need to stem its deteriorating competitive position and that a merger with another coal producer was the only realistic way to achieve this. Accordingly, prior to its affiliation with Freeman, the company attempted, without success, to merge with or acquire a number of other coal companies.

detail. The record in this case, as the trial court noted, "consists of more than 7,500 pages of trial transcript and deposition testimony, and more than 800 trial and deposition exhibits, containing in excess of 10,000 pages." (J.S.App. 2a, n.2.)

In the Proposed Findings of Fact and Conclusions of Law submitted by them following the trial, the defendants attempted to summarize and set forth in a concise and organized manner those portions of the trial record material to the issues raised in the complaint—and subject to review by this Court. Accordingly, for the Court's convenience, these Proposed Findings (hereafter "DPF") have been reprinted in full in the Joint Appendix, as have most of those portions of the record cited therein.

After its affiliation with Freeman, United Electric's land policies were changed, and an aggressive reserve acquisition program pursued. By that time, however, the strip reserves necessary for United Electric to remain a viable competitive force in the Midwest were controlled by other producers. There was also no prospect for United Electric remaining viable through entry into deep mining. Since at least 1930, and continuing to date, United Electric has had neither the equipment, personnel nor expertise required for successful entry into deep mining; it was strictly a strip mining company and was destined to remain so. In sum, whether viewed from the standpoint of 1959, or the date of the filing of the complaint, or the time of trial, United Electric was not going to survive as a significant competitive force.

The affiliation of Freeman and United Electric brought together "predominantly complementary rather than competitive producers." (J.S.App. 65a; see also J.S.App. 61a.) United Electric is a strip mining company producing low quality, high sulphur coal, while Freeman is a deep mining company producing high quality, low sulphur coal. The operations of United Electric are located in different ICC-designated Freight Rate Districts<sup>2a</sup> from those of Freeman, and as the Court pointed out, "responses to the subpoena questionnaire sent to midwest coal consumers demonstrated that each Freight Rate District serves a distinct and definable area, as did the testimony of producers and consumers." (J.S.App. 57a.)

Not until September 22, 1967 did the Government file its complaint alleging that the Freeman-United Electric affilia-

<sup>2a</sup> The Interstate Commerce Commission has designated various coal producing areas within Illinois, Indiana and west Kentucky as "Freight Rate Districts." See DPF 286-287, A.964. The history and functions of the Freight Rate Districts involved in this litigation are discussed in *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 576 (1949).

tion violated Section 7 of the Clayton Act and praying that General Dynamics be required to divest itself of its interests in United Electric. On the basis of two and a half years of pretrial discovery, a month long trial, and the submission by both sides of pretrial proposed findings and extensive post trial proposed findings, briefs and replies, a distinguished antitrust trial judge<sup>3</sup> reached the conclusion, after an "evaluation of the massive quantity of evidence submitted by the parties," that the challenged combination "has not led, and is not likely to lead to a substantial lessening of competition." (J.S.App. 2a, 65a.)

### SUMMARY OF ARGUMENT

The District Court's determination that the challenged combination does not violate Section 7 turned on a host of disputed and complex *factual* issues, each of which was resolved squarely against the Government on the basis of abundant evidence. It was this record evidence that compelled the court below to recognize that:

*First*, since virtually all of United Electric's economically mineable strip reserves have been sold under long-term contracts, and it has neither the possibility of acquiring more nor the ability to develop deep coal reserves, the Company is not a significant competitive force. (J.S.App. 65a-66a.) In fact, it was United Electric's critical reserve position which led it in the 1950's to seek affiliation with another coal producer. (J.S.App. 8a, n.7.)

*Second*, because of differences in the location and types of their mines, in the quality of their coals and in the nature

<sup>3</sup> Chief Judge Robson, who heard all of the evidence and spent nearly two years fashioning his decision, was the coordinating judge in the civil electric antitrust cases, an original member and the first chairman of the Judicial Coordinating Committee for Multiple Litigation and one of the principal architects of the Manual for Complex and Multidistrict Litigation.

of their transportation routes, Freeman and United Electric have long been predominantly complementary rather than competitive producers, and an independent United Electric would not and could not compete with Freeman to any substantial degree. (J.S.App. 61a-62a, 65a.)

*Third*, because it faces vigorous competition from other large coal producers, the challenge of competing fuels, and large and sophisticated buyers across the bargaining table, a combined United Electric-Freeman neither has led, nor is likely to lead, to a lessening of competition. To the contrary, the testimony of knowledgeable industry witnesses confirmed that the combination had no anticompetitive effect. (J.S.App. 65a.) The Government, despite a diligent search, was unable to find a single customer or competitor who thought otherwise, although at the time of trial, the affiliation was well into its second decade.

Accordingly, the Government was forced to present a theoretical structural case, relying largely on statistical data. This Court has made it clear, however, that while statistical data is important, "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anti-competitive effect of the merger."<sup>4</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.38 (1962). It was on the basis of precisely such an examination, involving a careful assessment of "all of the evidence" (J.S.App. 2a, 18a, 53a, 61a, 64a, 66a), that the District Court concluded that the challenged combination did not offend Section 7.

<sup>4</sup> This is particularly true where, as was the case below, the statistics in question fail "to measure market strength or competition as it exists." (J.S.App.59a.) The myriad deficiencies in the statistics proffered at trial by the Government are catalogued in Defendant's Proposed Findings 374 through 385, A.989-92, and discussed at pages 64 to 69, *infra*.

## I

As is fully detailed in the trial court's opinion (J.S.App. 11a-27a), the change in the composition and character of those consuming coal since World War II has had a substantial impact on coal producers. As the diesel engine replaced the steam locomotive, and as natural gas and oil displaced coal in the home and industrial heating markets, coal ceased to be a product consumed by a large number of relatively small volume users.\* The principal coal consumers today are the large utility companies which constitute coal's only remaining significant market. This market is predominantly served by large suppliers under contracts of five to fifteen years' duration and longer.

Uncommitted coal reserves are the essential key to competing for this business. It is such reserves—and not current production, profits, or cash flow—which provide the measure of a coal producer's viability in competing against the reserves of other coal companies and against the resources of suppliers of alternative fuels.

The evidence at trial showed, as the District Court found, that "virtually all of the economically mineable strip reserves of United Electric have been sold under long-term contracts, and United Electric has neither the possibility of acquiring more nor the ability to develop deep coal reserves." (J.S.App. 65a.)

Initially, the Government's principal contention on the reserve issue was that the coal reserves already owned by United Electric in the Industry and Round Prairie fields

\* It is, of course, this dramatic change in the nature and number of coal consumers which accounts for the progressive disappearance of small coal producers. In light of this, the Government's analogy to the decline in the number of single store grocery operations found significant in *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), rings false, as its own economist recognized at trial. (Folsom A.1706.)

provided the key to a successful future, since they could be profitably developed by a "competent and unfettered management." (Government Supplemental Interrogatory Answers 46 and 47; DX 46, p. 40, A.Ex.334.) Subsequently, however, the Government confessed to the District Court that it was "inclined to agree" with the defendants' representation that "as of today they are not commercially valuable." (Transcript of Pré-trial Conference of October 3, 1969, p. 23, A.874.)

Retreating from its rose-colored view of Industry and Round Prairie,<sup>\*</sup> the Government urged next that the simple solution to United Electric's shortage of commercially recoverable strip reserves was for the company to buy more. Geologists, mining engineers, company officials, other producers, and even its own economist, however, all testified to the fact that such reserves are unavailable for acquisition. (J.S. App. 63a.)

Recognizing the weakness of its secondary position, the Government announced a third: United Electric could survive by making a grass-roots entry into the deep mining of coal. Again, however, the evidence demonstrated that its experience as a profitable strip miner would not enable United Electric successfully to make a grass-roots entry into deep mining. (J.S. App. 61a.)

Confronted with these facts, the Government's Brief here announces yet a fourth position—the eleventh hour claim that evidence on the reserve issue related to the wrong time period. Once more, however, the record is to the contrary; it contains a wealth of evidence confirming that United Electric was in the same liquidating posture in 1959 as it was at the time of trial.

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<sup>\*</sup> Indicative of the extent of this retreat is that while the Industry and Round Prairie "issues" loomed large in the Jurisdictional Statement (pages 22-24) and Brief in Opposition to Motion to Affirm (pages 5-8), they are not even mentioned in the Government's most current brief.

This competitive demise of United Electric because of its critical reserve position is particularly significant when considered against the backdrop of other factors affecting coal producers. In determining what fuel to buy, for example, energy consumers can and do consider a wide variety of alternatives including, among others, coal, natural gas, oil, nuclear energy and hydropower. As is fully detailed in the opinion (J.S.App. 27a-53a), this was confirmed, not only by the responses to the subpoena questionnaire issued by the trial court, but by the testimony of a host of knowledgeable industry witnesses—including a representative cross-section of midwest utilities. Indeed, the evidence is clear that the present level of keen interfuel competition will intensify in the years ahead as public concern over the environmental impact of air pollution and strip mining increases and as technology for additional fuel sources continues to develop.

Other factors pertinent to an analysis of the likely competitive effects of the combination were disclosed in the evidence speaking to the size and sophistication of today's coal consumer—the electric utility. These utilities typically regard fuel purchasing as a top executive responsibility and purchase boiler fuel in such quantities that they can and do play the suppliers of one energy source against another, as well as one coal producer against another.

Such a market place stands in sharp contrast to the grocery market considered in *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), or the beer market in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966). There, millions of individual consumers, each making relatively small purchases, had no bargaining power at all. To analogize the purchase and sale of 10 million tons of coal under a twenty year contract to the purchase and sale of a bag of groceries or a six-pack of beer belies common sense.

## II.

The nature and extent of competition among coal producing companies is determined by such factors as the requirements and location of specific consuming facilities *vis-a-vis* the production capability and location of specific mines, and the available interconnecting transportation facilities. These "economic realities" concerning the role which both mine location and coal characteristics play in the competitive market place are especially significant to this litigation, since "[c]rucial to the Government's case is proof that United Electric and Freeman are actual or potential competitors." (J.S. App. 61a.)

United Electric's strip mines are located in different Freight Rate Districts and produce a different type of coal from the underground mines operated by Freeman. The results of the subpoena questionnaire issued by the District Court, as well as the testimony of consumers and producers, confirmed the significance of coal characteristics, that Freight Rate Districts serve essentially separate and distinct areas, and that Freeman and United Electric are predominantly complementary producers. This evidence compelled the conclusion that "an independent United Electric would not and could not compete with Freeman to any substantial degree." (J.S. App. 61a.)

## III.

In the final analysis, what the Government really despairs of is nothing more than the trial court's refusal to accept its invitation to substitute a simple, but wholly inappropriate, statistical divining rod for a painstaking and thoughtful analysis of the "reliable, probative and substantial" evidence reflected in more than 17,500 pages of testimony and exhibits. It should be emphasized in this regard that the trial court did not substitute some *other* statistical divining

rod for that urged by the Government. Rather, the District Court's conclusion that "no adverse consequences with respect to competition were shown either to have occurred or likely to occur" (J.S.App. 64a) was based on a meticulous two-year review and evaluation of all of the evidence relevant to such a determination.

In making this assessment, there was simply no way that the vigorous interfuel competition that exists in the market place could be ignored. The District Court refused to blind itself to these competitive facts-of-life and followed this Court's admonition to "recognize competition where, in fact, competition exists." *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962). See also *United States v. duPont & Co.*, 351 U.S. 377 (1956). Similarly, the District Court recognized that far more important than the particular labels identifying the geographical outbounds of the sections of the country, was granting full recognition to the extent to which the merging parties do and do not compete in analyzing the "crucial question" of the likely effects of their combination on competition. *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549-50 (1966).

Taking full account, then, of such "commercial realities" as the vigorous interfuel competition that exists in the market place and actual coal distribution patterns, the court below quite properly concluded that the longstanding Freeman-United Electric affiliation posed no threat to competition, and that this was true whatever the framework within which it was tested. Accordingly, the District Court, on the basis of the evidence presented at trial and detailed in its lengthy opinion, concluded with the specific holding that the challenged combination would not violate Section 7 "even were this court to accept the Government's unrealistic product and geographic market definitions." (J.S.App. 65a-66a.)

## ARGUMENT

### I

#### **SUBSTANTIAL EVIDENCE SUPPORTED THE DISTRICT COURT'S DETERMINATION THAT THE FREEMAN-UNITED ELECTRIC COMBINATION HAS NOT LED AND IS NOT LIKELY TO LEAD TO A SUBSTANTIAL LESSENING OF COMPETITION.**

After "evaluation of the massive quantity of evidence submitted by the parties", the District Court below concluded that the Freeman-United Electric combination did not violate Section 7 of the Clayton Act. (J.S. App. 2a.)<sup>7</sup> As will be shown, this determination turned on resolution of a host of factual issues peculiarly within the province of the trier of fact and decided squarely against the Government.<sup>8</sup> These findings based on "reliable, probative and substantial evidence contained in the record" (J.S. App. 66a.) were not "clearly erroneous" and should be affirmed. *United States v. du Pont & Co.*, 351 U.S. 377, 381 (1956); Fed. R. Civ. P. 52(a).

#### **A. United Electric Is Not A Competitive Factor.**

At page 65 of its Brief, the Government itself recognizes the indisputable premise "that if a firm has ceased to be an

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<sup>7</sup> "J.S." references are to the Jurisdictional Statement, and "J.S. App." references are to the opinion of the District Court as set forth in Appendix A thereto. "A." and "A.Ex." references are to the Joint Appendix and the Joint Appendix Exhibits to the Briefs before the Court. "DX" references are to defendants' exhibits; "GX" references are to Government exhibits; "Tr." references are to the trial transcript; and "Dep." references are to depositions. "DPF" references are to the Defendants' Post Trial Proposed Findings of Fact reprinted at pages 880-1016 of the Joint Appendix. "GPB" and "GRF" refer, respectively, to the Government's Post Trial Brief and the Government's Response to Defendants' Proposed Findings of Fact. Except where otherwise noted, emphasis has been supplied throughout.

<sup>8</sup> A full description of the nature of the evidence, the witnesses appearing, and the type of documents in the record, appears at DPF 9-48, A.887-99.

economically viable enterprise, its elimination cannot substantially lessen competition because it no longer is a significant competitive factor in the market." Indeed, the Government's own trial economist, on three occasions during his testimony, ventured his opinion that, without coal reserves or prospects to develop them, continuation of the combination would not be "adverse to competition" and United Electric "is not going to be in that situation a viable competitive force in this market, even if it is divested from General Dynamics." (Folsom A.1711, 1707-08, 1715.) This was precisely the reasoning followed by the District Court in its finding that the combination does not adversely affect competition because, in part, "United Electric can hardly be considered a competitive force" and "cannot contribute meaningfully to competition." (J.S. App. 63a, 64a).\*

This determination was made on the basis of a wealth of record evidence on key *factual* issues at trial. This evidence established that: (1) Because the utility market will undoubtedly remain the only substantial outlet for coal production, the key factor determining a producer's strength is coal reserves; (2) United Electric does not have the coal reserves to be considered a competitive force; and (3) United Electric has neither the possibility of acquiring more strip reserves nor the ability to develop deep coal reserves. In addition, (4) other industry forces at work make it inconceivable the combination could have an adverse effect on competition. (J.S. App. 63a-65a.)

#### **1. Reserves Are The Key Factor In Measuring A Coal Producer's Market Strength.**

Among the District Court's uncontested findings was that "[a]s a result of market losses to other forms of energy, the

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\* As is discussed hereinafter, pages 69 to 76, these findings were based on facts dating back to the early 1950's and not merely conditions prevailing at the time of trial.

utility market has become the mainstay of coal production." (J.S. App. 12a; Gov't. Brief, p. 4.) The evidence was that this market "will undoubtedly remain the only substantial outlet for coal production."<sup>10</sup>

In view of this, the focus of the court's scrutiny of the combination's effect on consumers centered on the utility market, as did the evidence adduced by both sides.<sup>11</sup> As a result, the trial court carefully analyzed the way in which coal was bought and sold in this market, and the manner in which coal producers competed for the custom of electric utilities.

Because of the need to have assurances of a steady supply of the required quantity of coal over a long period of time, and at an established cost, it was found that utilities typically arrange long-term contracts for all or at least a major portion of the total fuel requirements for the life of a generating plant.<sup>12</sup> As the court noted with respect to the coal purchased by Midwest utilities in 1967:

<sup>10</sup> J.S. App. 64a; see DX 216, A.Ex.1215; Gallagher Dep.Ex.1-3, A.Ex.1416; Steiner Dep.Ex.2, ¶ 2, A.Ex.1828-29. See, generally, DPF 146-166, A.925-30. The Government states at page 26 that "[t]he market for coal is therefore effectively confined to electric utilities and other large fuel users, such as cement manufacturers . . . ." However, the trial court reviewed the continuing "trend of industrial consumers away from coal" (J.S.App.30a-32a) and the evidence was that the kilns of cement companies are fired by gas, oil or low-sulphur coal which United Electric cannot produce. See Steele A.1281; Morris A.1151-52; DX 68, 69, 70, 74, 75, 76, 78, 242, A.Ex. 587, 588, 590, 600, 603, 604, 608, 1291.

<sup>11</sup> This is not to say the smaller consumer segments were not scrutinized as well. See J.S. App. 30a-32a; see, generally, DPF 205-210, A.941-43; DPF, 317, 319, 324, 326, 331, 333, 338, 340, A. 972-78; Redard A.568; H. E. Petersen A.365; Stipulated Testimony of Knecht (A.851), Sinclair (A.838), Sant (A.870) and Hemminger (A.869).

<sup>12</sup> See Gamble A.1336-37, 1341-43; Corey A.1417-19; Hill A.1302-05; Tomey A.1111-13; Davis A.1200-01; Schotters A.640-41; Nicosin A.516-17; Ward A.551-52; Gerber A.774-75; DX 86, p.3, A.Ex.736; DX 93, A.Ex.889.

*"[I]t is undisputed that approximately 76 percent was purchased under contracts of five years or longer and 43 percent was purchased under contracts of 15 years or longer duration." (J.S. App. 22a; emphasis, the court's.)*

Before entering into such long-term contracts, it was found, and admitted by the Government, that a utility normally seeks independent, geological verification of the existence and size of the supplier's coal reserve to assure itself that the supplier is capable of supplying the required quantity.<sup>13</sup> One utility executive emphasized that when a utility is arranging for a fuel supply for a modern generating station representing an investment of several hundred million dollars, it wants "to know that the people you sign a contract with are able to produce on their end of it." (Tomey A.1113; see also Gamble A.1343.)

In the wake of this evidence, it was found that the competition for the business of utilities was not for the sale of coal already produced, but for long-term contracts:<sup>14</sup>

*"Because of the trend toward long-term contracts and away from spot purchasing, competition in the electric utility market is not continuous in the sense that coal producers seek new orders from a given facility on a daily, monthly or even annual basis. Rather, competition tends to be a 'one time thing.' Once the initial coal contract is executed, competition to satisfy the coal requirements of a particular plant is effectively precluded for an extended period of time amounting to as*

<sup>13</sup> J.S. App. 20a-21a; GRF, p. 48. See Hill A.1309; Gamble A. 1343; Wood A.1193; Steele A.1278-79; DX 86, p.4, A.Ex.737.

<sup>14</sup> This Court has recognized the wisdom of such long-term contracts: "In the case of public utilities the assurance of a steady and ample supply of fuel is necessary in the public interest." *Tampa Electric Company v. Nashville Electric Co.*, 365 U.S. 320, 334 (1960); see also the dissenting opinion of Judge Weick in the Court of Appeals' decision in that case, 276 F.2d 766, 776 (6th Cir. 1960).

much as 15 years or even the full life of the plant."  
(J.S. App. 23a-24a.)

In this rivalry, it is obvious that a coal producer without sufficient reserves cannot effectively participate. This proposition was repeatedly confirmed by the experts, consumers and producers who testified,<sup>15</sup> and was recognized by the Government itself in fashioning the consent decree entered in *United States v. Peabody Coal Co.*, 1967 Trade Cas. 84,376 (N.D. Ill. 1967). (DX 84, A.Ex.640.) Central to that decree were the provisions requiring Peabody to divest itself of an operating coal business having no less than 120 million tons of reserves and prohibiting Peabody, for five years, from acquiring more than 5 million tons of coal reserves per year from any other producer.

In sum, it is beyond dispute that the critical determinant of whether a coal company can offer effective competition as a supplier is the level of verifiable, substantial and uncommitted coal reserves under its control. As one utility executive put it:

"[I]n the long range competitive picture, one of the big things is to assure ourselves of the proper reserve situation. We don't go into contracts with those or consider them competitive under this situation, unless they have the reserves to back it up and we can count on them down the road." (Wood A.1178. See also Wood A.1191-92; Corey A.1419-20; Davis A.1213; Steele A.1274-75; Schotters A.640-41.)

On the basis of all the evidence, the trial court was undoubtedly correct in its determination that coal reserves

<sup>15</sup> Sherwood A.1373-74, 1377; Folsom A.1706; Steiner A.1576-77; Tomey A.1111-14; Moser A.1391; Steele A.1267-69, 1278-79; Wood A.1177-79, 1187-88, 1193; Davis A.1200-01, 1204, 1224-25, 1227-28; Camicia A.1370-71; Abrahamson A.672; Morris A.101-02, 122-23; Steiner A.799-802; DX 26, A.Ex.249; DX 77, A.Ex.607; DX 86 (pp.3-5), A.Ex.736-38; DX 112, A.Ex.1015.

were "the key factor in a coal producer's market strength." (J.S. App. 65a.)

## 2. United Electric Does Not Have The Coal Reserves To Be Considered A Competitive Force.

United Electric's present rank is next to last in coal reserves (regardless of mineability) among the ten "leading" producers identified by the Government.<sup>16</sup> In addition, United Electric was found to control *less than one percent* of the total Midwest reserves controlled by all 37 coal producers in Illinois, Indiana and western Kentucky. (DX 61, A.Ex.577; GX 72, A.Ex.91; GX 85, A.Ex.98.)

Of the six mines which United Electric operated in 1948, four have since been closed, as have two others opened in the interim. The Mary Moore mine lasted only 10 years and closed in 1965 upon the exhaustion of strippable reserves earlier than predicted.<sup>17</sup> The Company's Cuba mine, opened in the 1920's, was closed in 1971<sup>18</sup> as the trial court had anticipated; the Banner mine, opened in 1960, will close in the fall of 1973, two years *earlier* than both the defendants and the court had expected. (J.S. App. 7a; DX 60(d), A.Ex. 568.)

Typical of the wide gulf between fact and the Government's view of things that has characterized these proceedings, the Government denied that the Cuba and Banner mines would shortly close (GRF, p. 8), and blithely asserted that "UEC personnel have drastically underestimated the remaining coal reserves around UEC mines." (GPB, p.

<sup>16</sup> Companies producing annually more than 300,000 tons in Illinois or more than 1,000,000 tons in the Midwest were defined by the Government as "leading" producers. See note 1 to both GX 72 and GX 85, A.Ex.91, 99.

<sup>17</sup> See Morris A.1077-78.

<sup>18</sup> See 1971 Annual Coal, Oil and Gas Report, Illinois Department of Mines and Minerals, pp. 18, 24-25.

129.) They contended that Banner would last at least another seven and a half years, and that substantial additional reserves around the mine would undoubtedly be acquired. In fact, the Government urged that *all* of the reserve fields of United Electric had additional mineable coals which defendants had not included in their estimates. (*Id.* at 128-33.) The trial court decided this head-on factual controversy squarely against the Government, preferring, as it did throughout, the views of knowledgeable, experienced coal mining personnel to the lay speculation of Government counsel.

The fact remains, as was found, that United Electric will shortly be down to two mines; that its mineable reserves stood at 52 million tons at the time of trial and that "*all but 4 million tons of the economically recoverable coal reserves of United Electric have been sold under long term contracts*"—the equivalent of about nine months' production. (J.S.App. 9a; emphasis, the court's; see DX 63, A.Ex.579.) Here again, the latter fact was denied by the Government at trial and the assertion is repeated here. The present claim (Gov't. Brief, p. 10, n.7) that 11 of the 52 million tons shown on Defendants' Exhibit 63 are not in fact committed because they are only in "negotiation," simply overlooks the trial testimony of the president of United Electric. Frank Nugent testified that since the exhibit had been prepared, one of the contracts involving this tonnage had actually been signed, and agreement reached on all essential terms in the two others. (Nugent A.1519-20.)

If any doubt remained that United Electric had reached the end of its reserves, it was dispelled by the evidence that United Electric's plight was well known within the industry, beginning in the late 1950's. For example, the president of a utility that had been purchasing coal from United

Electric for more than 25 years testified that "a number of years ago I reviewed with our operating people, our production people, the problem that we saw on the horizon, which was the diminishing reserves situation with United Electric." (Steele A.1268-69.)

The record abounds with this type of evidence. United Electric had been advised by some of its customers that it was no longer considered a competitor for any future business,<sup>19</sup> and a contract extension proposed by United Electric in 1965 was returned unsigned with the customer's admonition that it "would be meaningless in view of the limited Fulton County reserves that are controlled by your Company." (DX 26, A.Ex.249.) Other internal documents of the company, antedating the filing of the complaint, confirmed United Electric's debilitated reserve position. (See DX 23, A.Ex.241; DX 112, A.Ex.1015; Nugent Dep. Ex. 35, p.3, A.Ex.1788.)

Finally, the Government's cross-examination of A. H. Davis, President of Central Illinois Light Company, one of United Electric's major customers, provides a succinct commentary on the critical nature of United Electric's reserve problem:

Q. "So, are you in any position to say that if United Electric and Freeman were merged, that they would have no effect on CILCO in the future?"

A. "Well, we have studied the United Electric reserves, Mr. Sims, and we just can't see where United Electric has the reserves to be a factor in the coal business, as far as we're concerned." (Davis A.1213.)

<sup>19</sup> See DPF 88-89, A.909; Morris A.1065-66, 1138-41; Steele A.1268-69, 1278-79; Wood A.1177-79, 1193; Davis A.1204, 1224-25; Moser A.1391; Abrahamson A.672; Morris A.101-06; DX 77, A.Ex.607; DX 112, p.8, A.Ex.1016.

### 3. United Electric Has Neither The Possibility Of Acquiring More Strip Reserves Nor The Ability To Develop Deep Coal Reserves.

*Strip Reserves.* The finding by the trial court that "United Electric's coal reserve prospects for the future are singularly unpromising" (J.S. App. 63a) resolved against the Government another deeply disputed fact in the case. As with the other pivotal factual issues, this finding was based on a wealth of credible, competent evidence. The trial court had before it the testimony on the subject of three expert geologists (one a high government official), evidence from coal producers (including one called to the stand by the Government itself),<sup>20</sup> the testimony of coal consumers<sup>21</sup> and the testimony and documents of the defendants.<sup>22</sup>

Specifically, the report prepared by expert geologist John Organ<sup>23</sup> concluded that "such economically mineable strip reserves as exist within the Illinois basin [Illinois, Indiana and west Kentucky] are under the control of existing producers, and . . . such other strippable acreage that has not been acquired holds no competitive promise." (DX 88, A.Ex.796.) Comparably, the Principal Geologist of the Illinois State Geological Survey stated that "[s]o intense has been the interest in the more favorably situated strip

<sup>20</sup> Sherwood A.1373-74; Hopper A.1503; Organ A.686-89; Nugent A.62; Stipulated Testimony of George H. Shipley, A.848.

<sup>21</sup> Schotters A.648-49; Dorrance A.394.

<sup>22</sup> Morris A.1137; Ames A.1454; Thorson A.1167; Camicia A.1368-70; Camicia A.93; Nugent A.57-62; Inman A.199-200, 202-03; DX 23, A.Ex.241; DX 112, A.Ex.1015; Nugent Dep. Ex. 35, p.3, A.Ex.1788.

<sup>23</sup> The Government admitted that Mr. Organ's principal occupation since 1932 had been the exploration or acquisition for others of coal lands and mining rights, that he had been responsible for the development of numerous strip coal fields and had made on-site investigations in virtually every coal producing county in Illinois, Indiana and west Kentucky. See DPF A.894, and GRF, p.3.

reserves, that I do not know of any prime acreage that is not now under control." (DX 34, A.Ex.259.)

An exhaustive analysis prepared by Paul Weir Company (DX 87, A.Ex.751) concluded that (a) the *last* unmined major reserve of strippable coal in the Midwest was now under development, (b) that no new comparable strip operations would be developed and that (c) operators "have been unable to find economically strippable reserves not now controlled by others." This report confirmed its earlier opinion that contiguous coal reserves over 10 million tons were not available in Illinois for purchase from non-operating owners. (Letter attached to DX 87, A.Ex.791.) The Government admitted that this *was* the opinion of Paul Weir Company (acknowledged by a Government witness to be one of the most widely known and highly regarded mining engineering companies in the world),<sup>24</sup> but, typically, the Government denied that the opinion was accurate. (GRF, p. 209.)

There was also direct testimony by executives from Amalgamated Industries (a pseudonym to protect trade secrets) and Humble Oil and Refining Company that their own search for mineable strip coal in Illinois had been unsuccessful. (Dorrance A.394; Stipulated Testimony of George H. Shipley, A.848.) In addition, two Government witnesses confirmed the unavailability of strippable reserves: Mr. Hopper of Ayrshire Collieries recognized that "it is common knowledge within the coal industry that strip reserves available for acquisition are in extremely short supply" (Hopper A.1503), and the Government's own trial econo-

<sup>24</sup> Hopper A.1504. The Government also admitted that Paul Weir Company had served for 31 years as mining engineers and geology consultants for the Federal Government, coal producers, railroads, electric utilities, mineral ore firms and financial institutions. GRF, p.3.

mist, James Folsom, was forced to concede that "this record indicates that high quality strip reserves are relatively scarce in Illinois." (Folsom A.1693.)

*Deep Mines.* The Government also quarreled with the assertions by defendants that United Electric had no experience in deep mining, no ability to develop deep coal reserves and no likelihood of acquiring deep coal mining expertise. Here again, defendants carried the day on these factual issues with a wealth of evidence from a variety of sources.

The trial court held that "United Electric is a strip mining company with no experience in deep mining nor likelihood of acquiring it." (J.S. App. 61a.) These findings were in turn supportive of the court's conclusion that United Electric was not a competitive force: neither the limited marginal deep coal reserves controlled by United Electric,<sup>25</sup> nor those that might be available for purchase in the Midwest, would be of any help to an independent future for the company.

The evidence sustaining these findings may be summarized as follows:

*Deep Mining Experience.* As observed by the 10th Circuit in the *Kennecott* case, the "essentials" for new entry into the coal business are "extensive reserves and ready ability to deliver," "experience, know-how and equipment." *Kennecott Copper Corp. v. Federal Trade Commission*, 467 F.2d 67, 74 (10th Cir. 1972). With respect to deep mining, United Electric has none of these.

<sup>25</sup> The evidence was that United Electric's only deep coal reserve field, Round Prairie, was not commercially mineable by *anyone* in the near future. See DPF 428-30, A.1004; Nugent A.63-65; Camicia A.77-78, 91-93; Morris A.118-19. See also Camicia A.1364-65; Hopper A.1493, 1499-1501. The Government admitted these reserves "may not be commercially mineable at the present time." GRF, p.220.

At the time of its affiliation with Freeman, United Electric had been strictly a strip mining company; it had acquired neither the equipment, personnel, nor expertise required for successful entry into deep mining.<sup>26</sup> The company had stated in its 1956 Annual Report that, "For thirty-eight years your Company has been engaged in a single business—mining bituminous coal by the strip or open pit method. . . ." (Kolbe Dep. Ex. 2, p.7, A.Ex.1526.) Frank Kolbe, United Electric's chief executive from 1939 to 1959, repeatedly proclaimed that "underground mining is not our business," and that to have gone into deep mining would have been "something completely new."<sup>27</sup> As the Government admitted, United Electric's two attempts in the 1950's to engage in drift mining<sup>28</sup> were short-lived and unsuccessful (GRF, p.19): one lasted two years and "failed miserably", and the other involved only the purchase of an experimental mining machine which never worked and was junked.<sup>29</sup>

*Deep Coal Reserves.* Prior to July 31, 1958, United Electric had never acquired any deep coal reserves that had not been part of strip acreage at existing mines. The deep reserves they did control at that time were all adjacent to

<sup>26</sup> See DPF 100-15, A.912-17; Morris A.1049-53; Camicia A.1360-61; Ames A.1450, 1453-54; Thorson A.1167-68, 1258-59; Morris A.107, 111-13, 116; Camicia A.94-95; Inman A.186-88, 202, 206-09; Tarry A.242-45.

<sup>27</sup> Kolbe A.135-37. See also Kolbe A.162-63; DX 1, A.Ex.197; DX 6, A.Ex.209; DX 8, A.Ex.212; DX 220, A.Ex.1225; DX 221, A.Ex.1226; DX 222, A.Ex.1227; Kolbe Dep.Ex.W, A.Ex.1639-41; Kolbe Dep.Ex.X, A.Ex.1642; Kolbe Dep.Ex.12-13, A.Ex.1533-34.

<sup>28</sup> Drift mining involves merely punching into an already exposed seam of coal, usually from the pit floor of a strip mine. See Camicia A.1358-60.

<sup>29</sup> Morris A.113; Tarry A.267-68; Kolbe A.159-62; DX 1, A.Ex.197; Kolbe Dep.Ex.55 (p.5), 57 (p.6).

their strip operations; in any event, these amounted to only 17 million tons, of which 5 million had just been acquired solely in order to obtain contiguous strip reserves.<sup>30</sup>

After July 31, 1958, as the evidence showed, United Electric did begin to acquire deep coal reserves in the so-called Round Prairie Field. This activity was traceable to the growing contact between Freeman (an experienced deep coal miner) and United Electric, and was built upon United Electric's then current undertaking to acquire deep coal reserves as nominee for one of its customers.<sup>31</sup>

The evidence further demonstrated that United Electric never gave serious consideration to any deep coal reserves until the management of Freeman and United Electric became closely associated and, in fact, since 1958, United Electric made it a practice to seek Freeman's advice regarding any deep mining possibility.<sup>32</sup> Finally, it was not until its 1961 Annual Report that United Electric for the first time disclosed to its stockholders that it controlled deep coal reserves. (Kolbe Dep.Ex.7, p.7, A.Ex.1532.)

*Deep Mining Potential.* The evidence was overwhelming that there was no reasonable probability that United Electric could successfully undertake deep mining and, therefore, no reasonable probability that it would try. This

<sup>30</sup> Morris A.1080-81; Morris A.123-24; GX 23; DX 60(b), A.Ex. 518.

<sup>31</sup> Morris A.1054-56; Ames A.1453-54; Kolbe A.141-42, 177-79; Dorrance A.392; Inman A.200-02, 204-05; Sloane A.361-62; DX 5, A.Ex.206.

<sup>32</sup> Ames A.1454; Thorson A.1167-68, 1258-59; Morris A.1054, 1083-84; Nugent A.1478; Inman A.204-06, 210-11; Tarry A.266-69; Morris A.112-17, 119-20; DX 14-18, A.Ex.226-234; DX 21, A.Ex.238; DX 25, A.Ex.247; DX 28, A.Ex.252; DX 32, A.Ex.256; DX 113 (p.4105), A.Ex.1031; Morris Dep.Ex.4-5, A.Ex.1680-82; Morris Dep.Ex.32, A.Ex.1688; Morris Dep.Ex.35, A.Ex.1689; Morris Dep. Ex.42, A.Ex.1691; Morris Dep.Ex.46, A.Ex.1693; Morris Dep. Ex. 55, A.Ex.1695; Morris Dep.Ex.62, A.Ex.1712.

evidence consisted of the opinion of Paul Weir Company, expressed in the Report referred to above (DX 87, A.Ex. 751), the testimony of others experienced in the field, and the views of coal consumers. As the Weir report concluded,

"While it is, of course, impossible to state for certain whether or not United Electric would even have attempted to undertake deep mining, it is improbable that they could have done so successfully, and, therefore, highly unlikely that they would have tried. This would have been true even if United Electric had had the best deep-mining reserves to work with." (DX 87, pp.29-30, A.Ex.781-82.)

As the evidence showed, United Electric's strip mining experience would be of no value to it in attempting to undertake deep mining. There is virtually no phase of the expertise acquired in strip mining than can be carried over to deep mining, and there is no correlation between the engineering and know-how related to each. (Camicia A. 1360-61.)

Strip mining is in many ways analogous to the earth moving which road contractors perform. While deep mining is very difficult and highly technical, strip mining involves none of the elements of shaft and hoist construction, underground roof conditions and maintenance, gas emission, drainage, ventilation, extrication methods, mine safety problems or equipment peculiar to deep mining. Because of these complexities, deep mining entails risks unknown to strip mining, and the failure of deep mines because of bad judgment is not infrequent.<sup>23</sup>

<sup>23</sup> See DPF 413-420, A.1000-02; Camicia A.1359-60; Gaunt A.588-89; Kolbe A.156-58. Precisely on point is the fact that Freeman's deep coal mine "Crown" had to be abandoned in 1971. See 1971 Annual Coal, Oil & Gas Report, Illinois Dept. of Mines and Minerals, p.18. The Crown mine had produced 1.8 million tons in 1970. See 1970 Annual Coal, Oil & Gas Report, Illinois Dept. of Mines and Minerals, p.18.

Nicholas T. Camicia, President of Pittston Company (one of the world's largest deep mining coal producers), and a past president of Freeman-United Electric, testified at trial. On the basis of his professional knowledge and expertise as a deep mining engineer and executive, and his familiarity with United Electric's capabilities and personnel gained while serving as the company's president, he did not see how United Electric could possibly make a successful entry into the deep mining of coal:

"You can go out and pick up any kind of construction worker and start up a strip mine. But in deep mining it is a very different business, and it takes a different type of person, even insofar as attitude."<sup>34</sup>

It was Mr. Camicia's conclusion that United Electric "certainly was not in a position to go into a deep mine venture" and that "they would have made a mistake if they had tried." "I don't see how they could even make a start at it." (Camicia A.1365-66, 1361.)

An additional factor that would make a deep mining attempt by United Electric even more unlikely was the grave doubt that utility companies or any other large buyer of coal would be willing to enter into a contract for underground coal with a company with no experience. As one utility president testified, "we always have felt or thought of United Electric as a strip mine company, not having any prior experience with deep mining. I would say that we would be hesitant about entering any commitment for coal from an unknown source, so to speak." (Steele A.1279-

<sup>34</sup> Camicia A.1360-61. One United Electric executive put it this way: "We are afraid. If you told me . . . that starting tomorrow you can't do what you are doing, we are going to send you down to train to be the superintendent for an underground mine, I would say, 'Uh-uh, I am on my way. Just get another boy.'" Tarzy A.244.

80.) The testimony of other consumers reflected the same viewpoint.<sup>25</sup>

Confirmation of the above analysis resided in the observation that, with the single exception of the recent venture by the world's largest industrial corporation,<sup>26</sup> there was no evidence that any company had ever attempted to make a grass-roots entry into deep mine coal operations in recent history in the Midwest.<sup>27</sup> The Government had claimed at trial that Ayrshire Collieries had done so, and one of its executives was called by the Government as a witness. He related, however, that Ayrshire had opened a deep mine only *after* acquiring two deep mine coal companies and even then the mine had been a failure and should not have been built. (Hopper A.1495-97.) This Government witness also concluded that United Electric "would be in a very awkward position" were it to attempt underground mining. (*Id.* at 1509.)

Faced with this abundance of evidence, the Government is left in its brief with the observation that "United Electric has had both the *financial* resources and general *marketing* experience necessary to enter deep mining." (Gov't. Brief, p. 72.) But the evidence showed that these attributes were simply not enough; more is required to enter deep coal

<sup>25</sup> Moser A.1403-04; Tomey A.1114-15; Gaunt A.588-89; Abrahamson A.663; Sloane A.359-60; Morris A.119.

<sup>26</sup> Both common sense and the Government's own prior observations belie the validity of any parallel (Gov't. Brief, pp. 72-74) between what Humble Oil, subsidiary of Standard Oil Co. (New Jersey) would do and could do, and what an independent United Electric might successfully undertake. In their Briefs and proposed findings (DX 81-83, A.Ex.617-39) in *United States v. Standard Oil Co. (New Jersey)*, 253 F.Supp. 196 (D.N.J. 1966), the Government pointed out that there is no correlation between Standard Oil's ability to make a grass-roots entry into deep mining and that of a smaller company attempting a similar venture. (*Id.* at 200, 208, 223, 227.)

<sup>27</sup> See Nugent A.72; Camicia A.1362.

mining successfully than money and the ability to sell coal, as the record amply demonstrates.

Based upon the entire record, we respectfully submit that the District Court's resolution of the factual issues concerning United Electric's bleak and irremediable future were clearly correct.<sup>23</sup> The finding that United Electric was not and could not become a viable competitive force stands unshakable. This is apparent, we suggest, from the Government's confession in its Brief (page 2, note 1) that "[t]he focus has been shifted [since its Jurisdictional Statement] from the evidentiary support for the finding to its legal sufficiency as a basis for concluding that the merger would have no anticompetitive effect." The Government is reduced, in the end, to musing that it is "hard to believe" that United Electric "would idly sit by and allow its entire coal business to disappear."<sup>24</sup> This incorrectly states the

<sup>23</sup> Contrary to the Government's representations that these findings and the evidence in the record related solely to the time of trial (Gov't. Brief p.71), United Electric's reserve crisis was shown to have existed in the 1950's and its inability to acquire additional reserves was established by evidence relating to that period and throughout the 1960's, as well as to the time of trial. See discussion at pages 69 to 76, *infra*.

<sup>24</sup> Gov't. Brief. p. 73. Apparently, however, this not infrequently happens. Little Dog Coal Company, according to the Government a "leading" producer in 1967, abandoned operations the following year. Compare GX 72, A.Ex.91, with Beck Dep. Ex.1, A.Ex.1411. The Government offered no explanation as to what happened to its other "leading" producers Mid-Continent Coal Corporation, Lumaghi Coal Company, Saxon Coal Corporation, Young's Coal Corporation, Crab Orchard Cooperative Coal Company, J.W. Coal Company, Big Muddy Coal Company, Ajax Coal Company, Jo-Lor Mining Company, or Snow Hill Coal Corporation (all of which have apparently abandoned operations)—other than to show that they were not acquired by other Midwest coal producers. Compare GX 87, A.Ex.101 with GX 62-86, A.Ex.81-100, DX 46, A.Ex.295.

issue<sup>40</sup> and, in any event, manifestly fails to overcome the compelling force of the evidence.

**4. Other Industry Forces At Work Make It Inconceivable The Combination Could Have An Adverse Effect on Competition.**

In the context of United Electric's terminal condition in an industry marked with intense competition, only blind adherence to numerology can foster a belief that the Freeman-United Electric combination poses *any* threat to competition, much less the "substantial" one required by Section 7.

In reviewing the pressures it deemed "crucially relevant to its assessment of the competitive effect of the United Electric-Freeman combination," (J.S. App. 53a), the District Court found that the intense competition which Midwest coal producers face is likely to increase even more (J.S. App. 18a) in light of:

(a) competition from nuclear energy and other alternative fuels (J.S. App. 27a-41a);

(b) the growing concern with the environment which will greatly disadvantage companies, like United Electric, that produce only low quality, high sulphur coal (J.S. App. 41a-53a);

(c) pressures from large, informed and capable buyers of coal (J.S. App. 18a-27a); and

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<sup>40</sup> While United Electric has no future in the Midwest, it is not going to let its coal business disappear. It has coal reserves in Oklahoma and Colorado to which it has now turned its attention as well as to other opportunities in the West; this is obviously where the company's future resides. See J.S. App. 61a; Tarry A.282-90; Tarry Dep. 429-38; Inman A.202-03; Jensen A.291-92; DX 29, A.Ex.253; DX 31, A.Ex. 255; DX 60(a), A.Ex. 517. By agreement of the parties, United Electric's western reserves were not an issue in the litigation. See J.S. App. 9a, n.8; DX 47, ¶42, A.Ex.339; A.1135-36.

(d) the presence of a substantial number of viable coal producers, many with multifuel capability. (J.S. App. 16a-18a.)

*Given these industry forces at work, United Electric, with only 4 million tons of unsold coal, just cannot affect the level of competition in its markets, one way or the other.*

*Interfuel Competition.* Based upon Government reports and studies,<sup>41</sup> the statements of Government officials,<sup>42</sup> energy experts,<sup>43</sup> trade association executives,<sup>44</sup> and a wealth of other evidence,<sup>45</sup> the trial court fairly concluded that:

"Interfuel competition will continue to erode coal's share of the energy market as more and more industrial consumers convert from coal to gas or oil, and as these fuels, along with nuclear energy and the emerging technology of still other alternative power generation sources, further challenge coal's share of the fuel needs of electric utilities." (J.S. App. 28a.)

While its Brief to this Court quibbles with the intensity of interfuel competition in the Midwest, the Government concedes "[t]here may well be an energy market" (page 20) and time and again acknowledges the effects of interfuel

<sup>41</sup> DX 102, A.Ex.921; DX 103, A.Ex.996; DX 107, A.Ex.1003; DX 108, A.Ex.1008; DX 109; DX 110, A.Ex.1011; DX 115; DX 116, A.Ex.1042; DX 257, A.Ex.1381.

<sup>42</sup> DX 45, A.Ex.287; Testimony of Ernest B. Tremmel (AEC), A.1229-55; E. C. Hill (TVA), A.1290-1314; Aldo P. Brazzale (GSA), A.425.

<sup>43</sup> Dr. Bruce C. Netschert A.731, and DX 89, A.Ex.798; Abraham Gerber A.764, and DX 86, A.Ex.733; S. Smith Griswold A.706, and DX 87, A.Ex.751; George Gamble A.675. The qualifications of these experts are set forth in DPF 28, 39-41, A.892, 895-97.

<sup>44</sup> Harold S. Walker, American Gas Association, A.465 and Winfred C. Peterson, National Oil Fuel Institute, A.446.

<sup>45</sup> See, generally, DPF 192-282 (A.938-63) and the evidence referred to therein.

competition.<sup>46</sup> In view of the evidence in the record, recognition that coal has in the past, does in the present, and will in the future face intense competition from suppliers of alternate fuels is inescapable. The trial court's detailed and reasoned description of this battle (J.S. App. 27a-41a) well summarizes the evidence and needs not to be repeated here. Suffice it to say that the Government's own trial economist testified that "the customers in this case all—all the utility customers have indicated that they consider all sources of fuel in making the decision. . . . They did not say that they considered the primary competition coal with reference to future facilities, certainly." (Folsom A.1703.)

Victor Wood, Superintendent of Fuel Procurement for Northern States Power, articulated the realities of the situation:

"Certainly competition between coal suppliers is a big factor, but I believe overriding this, which sets the over-all competitive picture, is the alternate fuel competition. There is competition among all fuels as well as among coal suppliers." (Wood A.1188).

This was similar to the views of Gordon Corey, Chairman of the Finance Committee of Commonwealth Edison:

"Q. In your opinion, Mr. Corey, what is Commonwealth Edison's major concern with respect to competition among its fuel or energy suppliers?

"A. I guess it is to have adequate competition and as the energy field gets more diverse, it is hopefully to continue to have effective competition between coal and oil and nuclear. I believe that is one way of putting it." (Corey A.1420.)

It was accordingly concluded by the trial court, supported by the views of defendant's economist Dr. Peter O. Steiner,<sup>47</sup>

<sup>46</sup> Gov't. Brief, pp. 3-4, 14-15, 22, 24-28.

<sup>47</sup> For Dr. Steiner's qualifications, see DPF 42, A.897-98.

that this intense level of interfuel competition was necessary to any valid predictions concerning the coal industry's future: "Because interfuel competition particularly provides utilities with a strong bargaining weapon in negotiations with coal producers, this competition exerts strong pressure on the market in which coal producers sell their form of energy."<sup>48</sup>

The role of this factor in predicting the future effect of the Freeman-United Electric combination on competition is clear: the level of that competition is so significantly influenced by the rivalry among various forms of energy that it belies common sense to contend that a competitively moribund coal producer like United Electric even enters the picture.

*Concern With The Environment.* The court found, on the basis of the substantial evidence in the record concerning environmental controls,<sup>49</sup> that "[t]he air pollution restrictions adopted throughout the midwest are substantially increasing the already intense competition which coal faces from other fuels." (J.S. App. 43a.) Moreover, the court observed, electric utilities and other large coal consumers will not be able to avoid air pollution restrictions by locating future facilities in rural areas in view of the demand for state-wide controls.<sup>50</sup> Even when commercially acceptable pollution control devices become available,<sup>51</sup> the capital and operating

<sup>48</sup> J.S. App. 53a-54a. See Steiner A.812-13, 1581; Steiner Dep. Ex. 2, ¶12, A.Ex.1834-35.

<sup>49</sup> Middleton A.381-82; Middleton Dep. 5-6; Moore A.614-16, 621-22; Stanley A.486-87; Netschert A.748-49; Griswold A.714-15, 719-20, 725-26; DX 71 (p.2), A.Ex.592; DX 85 (p.2), A.Ex.648; DX 90 (p.2), A.Ex.867; DX 136, A.Ex.1085; DX 139-43; DX 151-57, A.Ex.1120-35; DX 234 (p.6), A.Ex.1266; DX 254 (p.1), A.Ex.1306; Middleton Dep. Exs. 1,3.

<sup>50</sup> Moser A.1389-91; Moore A.619-20; Schotters A.646-47; Netschert A.747-49; Griswold A.729-30.

<sup>51</sup> See, generally, DX 89, A.Ex.798; DX 254, A.Ex.1298.

costs involved may well lead to the exclusion of coal from the competitive picture for some utilities in favor of other fuels.<sup>52</sup> (J.S. App. 41a-51a.) Finally, many of the governmental restrictions adopted to date have taken the form of banning the burning of high-sulphur coal altogether.<sup>53</sup> This has been particularly grievous in the case of producers, such as United Electric, who produce only high-sulphur coal. (J.S. App. 52a.)<sup>54</sup> As one utility executive put it, "Air pollution is getting to be the overriding issue."<sup>54</sup>

The essential point here is that environmental controls will handicap coal producers in their ability to compete. Illustratively, United Electric's largest former customer—Commonwealth Edison—testified at trial that "we have sort of put our eggs in the nuclear basket" and that the move toward nuclear power "is the best way to take care of our massive electric power generation problems with a minimum of disturbance to the environment." (Corey A. 1414.) Moreover, because of its low-sulphur coal program, Edison has begun "phasing out" its high sulphur coal producers. "As you know," Finance Committee Chairman Corey testified, "the United Electric contract expires this year and has not been renewed." (*Id.* at 1437-38.)

<sup>52</sup> Steiner A.1624-26; Wood A.1190-91; Corey A.1413; Nugent A.1522-23; Netschert A.748; DX 89, pp.23-24, 61-63, A.Ex.822-23, 860-62.

<sup>53</sup> Griswold A.717-19; DX 89, pp.13, 14 (Table 2), 15 (Fig. 1), 23, A.Ex.812-14, 822.

<sup>53a</sup> The trial court found in this regard that, because of air pollution regulations, United Electric "will not be able to serve [the Chicago area] market." (J.S. App.62a; see also J.S. App.58a.)

<sup>54</sup> Tomey A.1130. See, generally, DPF 246-282, A.952-63. See also Steele A.1267-68; Wood A.1175-76, 1190-91; Davis A.1199-1200, 1207-08; Moser A.1389-91; Corey A.1414-16; Hill A.1313; Gamble A.1350-51; Schotters A.642-43; Petersen A.368-71; Morrison A.607-08; Ward A.560; Redard A.570-71; DX 71, A.Ex.591; DX 176, A.Ex.1158; DX 178, A.Ex.1160; DX 179, A.Ex.1161; DX 187-88, A.Ex.1169-70; DX 191-92, A.Ex.1173-74; DX 234 (pp.6-7), A.Ex.1266-67; DX 238, A.Ex.1278; DX 239, A.Ex.1279.

**Customers.** The court found that mergers within the utility industry had both diminished the number of utility companies and had increased the purchasing power of those surviving. In light of the fact that fuel expenditures were a major component of a utility's operating cost, it was also found, and admitted by the Government, that utilities regarded fuel purchasing as a major executive responsibility, exercised with great sophistication and knowledge. (J.S. App. 24a-26a; GRF, p.54; DPF 187, A.936-37.) Witness to this bargaining power was the testimony of executives of all the significant coal users in the Midwest, including Commonwealth Edison, the Tennessee Valley Authority, and 12 other utility customers of Freeman or United Electric.<sup>55</sup> These fourteen firms consumed about 70 million tons of coal in 1967, an amount 10 percent greater than the *entire* Illinois production of coal that year, 3½ times greater than that of the state's largest producer, and more than one half of all the coal produced in Illinois, Indiana and west Kentucky.<sup>56</sup>

The evidence from these witnesses recited the great care with which coal contracts were negotiated,<sup>57</sup> the playing of

<sup>55</sup> Central Illinois Public Service ("CIPS"), Dairyland Power Cooperative, Illinois Power Company, Electric Energy, Inc., Union Electric Company, Wisconsin Electric Power Company, Wisconsin Public Service Company, Wisconsin Power and Light Company, Central Illinois Light Company ("CILCO"), Interstate Power Company, Iowa Public Service Company and Northern States Power Company.

<sup>56</sup> Compare DX 85, Table XXX, A.Ex.717, with GX 72 and 85, A.Ex.91, 98. Consumption totals for Interstate Power Co. and Iowa Public Service Co. were taken from Kurtz Dep. Ex.8, pp.17, 19.

<sup>57</sup> See, generally, DPF 167-191, A.931-38. Gamble A.1329-30, 1343-46; Hill A.1290-91, 1309; Steele A.1263-64; Davis A.1196-97; Moser A.1385; Corey A.1404-05; Tomey A.1105-06; Wood A.1173; Ward A.547-48; Nicosin A.498-99; Redard A.569; Gaunt A.576-77, 592; Morrison A.596-97; Abrahamson A.650-51; Schotters A.636-37, 642-43; DX 150, p.51, A.Ex.1108.

one coal supplier against another,<sup>55</sup> the use of inter-fuel substitutability as leverage,<sup>56</sup> and the future likelihood of pooling of purchasing power.<sup>57</sup> In sum, there was no denying the fact that utilities wielded great economic power. (See, particularly, Gamble A.1343-44.) As the court noted, "the Government has conceded that utilities have at least equal bargaining power with coal producers in the mid-west." (J.S. App. 27a.) The dimensions of that power were reflected in the Government's haste to point out that Commonwealth Edison, for example, did not take "unfair advantage" of midwestern coal producers. (Government's Proposed Findings of Fact, p.25.)

*Producers.* From the evidence, the court noted the presence in the market of a substantial number of viable coal producers, and that United Electric had found itself competing with much larger corporate enterprises which produced and sold a variety of energy sources and could thus fill all of a utility's fuel needs. (J.S. App. 18a, 40a.)

Treating Freeman-United Electric as one, the Government identified ten "leading"<sup>58</sup> coal producers in Illinois and the Midwest in 1967, producing a total of 63.6 and 118.3 million tons respectively. (GX 72, 85, A.Ex.91, 98.) The Government's 1967 lists, however, failed to include the names of two new entrants to Illinois and the Midwest: Humble Oil and Refining, which was constructing a deep

<sup>55</sup> Davis A.1219-20, 1225. This was admitted by the Government. GRF, p.54; DPF 188, A.937-38.

<sup>56</sup> Nicosin A.534; Schotters A.641.

<sup>57</sup> DX 232, A.Ex.1247; DX 233, A.Ex.1249; DX 257 (§ IV and Apps. A, B and C), A.Ex.1398-1405.

<sup>58</sup> Companies producing annually more than 300,000 tons in Illinois or more than 1,000,000 tons in the Midwest were defined by the Government as "leading" producers. See note 1 to both GX 72 and GX 85, A.Ex.91, 99.

mine in Illinois capable of producing 3 million tons a year and the 6 million ton operation being divested by Peabody.<sup>62</sup>

Further, it was shown that all of these "leading companies," save one, had substantially greater coal reserves than United Electric, without regard to mineability. In any event, total coal reserves held by all companies surveyed in the Midwest totalled in the billions of tons. (DX 62, A.Ex. 578.)

It was also found that the oil industry had established itself as a major element in coal production, linking under common ownership in many instances the energy resources of coal, oil, gas, uranium, oil shale and tar sands. In fact, oil companies accounted for more than 25 per cent of the coal produced in Illinois, Indiana and western Kentucky in 1967. (J.S. App. 40a.) Significantly, Freeman and United Electric had no affiliates engaged in any other fuel industry. (J.S. App. 3a-4a; GX 138.)

In light of this evidence, it is clear that the level of competition produced by the large number of viable coal producers moves without regard to United Electric's liquidating position, and United Electric is powerless to affect it.

#### **B. The Combination of Freeman-United Electric Did Not Eliminate Actual or Potential Competition.**

With respect to the Government's attempt to prove that the combination eliminated competition, the District Court observed that "[c]rucial to the Government's case is proof that United Electric and Freeman are actual or potential competitors." (J.S. App. 61a.) The court settled this factual issue against the Government.

<sup>62</sup> See Stipulated testimony of George H. Shipley (A.848), DX 84, A.Ex.640, and page 16, *supra*.

The Government relied at trial, as it does here (Gov't Brief, pp. 11, 60-62), on a series of charts purporting to show that in 1965 through 1967, Freeman and United Electric sold coal to the same customers. (GX 88-91, A.Ex.107-17.) In rebutting this claim, defendants introduced uncontradicted documents and testimony, much of it from the very customers involved.<sup>83</sup> This evidence was to the effect that, with the possible exception of sales to Commonwealth Edison, none of the shipments chosen by the Government for analysis would have been competitive had Freeman and United Electric been independent. The Government's charts were totally discredited by the following evidence:

1. Shipments to four of the Government's "common customers"—Central Illinois Light Company, Illinois Power Company, Caterpillar Tractor Company and Marquette Cement Manufacturing Company—involved entirely different plants; no one facility was able to be served competitively by both Freeman and United Electric.<sup>84</sup> This was established by the testimony of defendants' executives and directly confirmed by the customers involved.<sup>85</sup> The explanation of the Chairman of the Board of Illinois Power Company is illustrative: "Because of the location of the United Electric and Freeman mines as related to the generating stations of Illinois Power Company we had not regarded the two companies as competitors with respect to

<sup>83</sup> See, generally, DPF 346-60, A.980-85.

<sup>84</sup> During the first part of 1965, United Electric was serving the Vermillion plant of Illinois Power Company with coal from its Mary Moore mine, 15 miles away. The mine closed earlier than anticipated, and upon the insistence of Illinois Power, Freeman shipped coal to the plant at a sacrifice in order to fulfill United Electric's contractual obligation. Once the contract ran out, Freeman ceased shipments. (Morris A.1077-78; GX 90, A.Ex.114.)

<sup>85</sup> Morris A.1072-74, 1077-79; Nugent A.1517-19; Davis A.1199-1200, 1204-05; DX 76, A.Ex.604; DX 230, A.Ex.1244.

service to any particular station. Freight costs prevented such competition." (DX 230, A.Ex.1244.)

2. Freeman's shipments to four other of the Government's "common customers,"—Dairyland Power Cooperative, Foote Minerals, Union Electric Company and the Meredosia Station of Central Illinois Public Service Company—were a by-product dust, which United Electric did not and could not produce; United Electric's shipments were screenings, a product not competitive with dust. Again, the testimony of defendant's executives that these shipments were non-competitive was directly confirmed by the customers involved.<sup>66</sup>

3. Similarly, different products were shipped by both companies to another of the Government's "common customers," Inland Steel Company. United Electric's shipments were steam coal for the generation of electricity, while Freeman shipments were metallurgical coal for making steel. (Morris A. 1078-79.) The Government has conceded that United Electric cannot compete with Freeman for the sale of metallurgical coal. (GRF, p. 8; DX 46, p. 35, A.Ex. 329.)

4. The two remaining "common customers", as shown through the testimony of the customers involved, were found to be situations where United Electric had no competitive status at all. In the case of the Tennessee Valley Authority, permission had been received to ship coal from United Electric's Fidelity mine in fulfillment of Freeman's contract with TVA during certain periods of the year when adverse river conditions closed the Fidelity mine from its natural markets. United Electric alone could not have com-

<sup>66</sup> See, generally, DPF 351-54, A.981-82; Morris A.1074-77; Morris A.120-21; Nugent A.1518-19; Tarzy A.258-62; Moser A.1388; Tomey A.1109-11; DX 231, A.Ex.1245.

mitted itself to TVA competitively on a long-term or even yearly basis. As the former coal purchaser for TVA explained at trial: "... [I]t is highly unlikely that they [United Electric] would have or could have competed with the other sources of coal . . . ." <sup>67</sup> Mr. Folsom, the Government's own economist, was equally straight-forward:

"The way the thing occurred in the record, I would not say that that particular shipment represented competition." (Folsom A.1694-95.)

It was also revealed that United Electric could not sell directly to Wisconsin Public Service Company because the characteristics of its coal did not fit the design of the utility's boiler equipment. United Electric shipments were undertaken solely because Freeman had trouble fulfilling its contractual obligations in 1965 and 1966 (the only years in question), and only because the coal could be mixed with Freeman coal at a dock in Chicago in order to meet the coal specification requirements. (Morris A.1075-76; Nugent A.1518-19.) Again, it was confirmed by the Superintendent of Steam Plants for Wisconsin Public Service Company that, independently, United Electric would not be considered by his company as a potential supplier. (Morrison A.604.)

It thus remained that only one of the Government's "common customers" involved a situation where coal shipments by the two companies might have been competitive: sales to Commonwealth Edison Company. Even here, however, these sales had to be considered in light of Edison's coal requirements. Because Edison was required to purchase coal from several Freight Rate Districts in order to fulfill its needs, as the Government admitted, the competition which a given mine had to meet in bidding for Edison

<sup>67</sup> Hill A.1298-99. See also Hill A.1297-98; Morris A.1075; Nugent A.1518-19; Nugent A.41-42; Folsom A.1694-95; Tarry A.232-34; DX 103-04, A.Ex. 996-98.

business was that of the other mines within its Freight Rate District, rather than that of mines in other districts. (GRF, p.180; Nugent A.45-46; Tarzy A.264-66; Camicia A.85-86.)

Regardless of whether United Electric could have competed with Freeman for the business of Commonwealth Edison, it cannot be concluded that the United Electric-Freeman combination had any adverse effect on that company, as the testimony of one of Edison's top officials made clear. (Corey A.1419-21.) Edison's \$2.5 billion in assets, the magnitude of its coal purchases, its commitment to nuclear energy, its readiness to use alternative fuels and its ownership of its own coal reserves and uranium resources made it totally improbable that Edison could have been adversely affected by the combination.<sup>65</sup>

The weight of the foregoing evidence is hardly overcome by the assertion in the Government's Brief (page 60) that United Electric and Freeman solicited the same customers. Since coal purchases are made for specific plants, rather than on a company-wide basis, solicitation of the same customers by the two companies means nothing in and of itself.<sup>66</sup> Nor do the testimony and exhibits referred to on the same page of the Government's Brief compel a contrary conclusion.

<sup>65</sup> See Corey A.1405-09, 1414, 1420, 1446-47; DX 90, A.Ex.866; 93-100, A.Ex.889-912; GX 135, A.Ex.126. The Government admitted that 1967 sales to Commonwealth Edison accounted for about a third of United Electric's production. Edison purchases from United Electric, on the other hand, represented scarcely a tenth of its overall coal requirements. See DPF 359 (note), A.984.

<sup>66</sup> The same was found to be true in *United States v. Crocker-Anglo Nat'l. Bank*, 277 F. Supp. 133 (N.D. Cal. 1967), where the court noted that "the fact that each of the banks had the same customers did not indicate that they were competing for the business of that customer." 277 F. Supp. at 177.

The cited testimony of Mr. Camicia (Camicia A.83-84) reflects nothing more than the data shown on the Government charts discredited at trial, and Camicia testified he knew of no other "common customers." (Camicia A.79-83.) Mr. Kolbe's testimony referred to by the Government was very general and imprecise; its implications were contradicted by John Morris, Vice President in charge of sales for United Electric and, subsequently, President. Kolbe testified Mr. Morris was far more informed than he about the marketing of coal. (Kolbe A.131-32.) Significantly, Morris testified that the "common" shipments of United Electric and Freeman could not have been competitive. (Morris A.1069-81.) Government Exhibits 93 and 94, A.Ex.118, 121 (letters from Central Illinois Public Service and Illinois Power Company) show only that Freeman and United Electric both sold coal to both companies, as explained above. Neither supports the Government's proposition, as the subsequent letters from these customers make clear. (DX 230 and DX 231, A.Ex.1244-45.) Finally, the cited testimony of Edison's Gordon Corey (A.1437) referred to the period prior to 1959 and, in any event, must be viewed in the context of Edison's bargaining position and Mr. Corey's testimony that the combination had had no adverse effect on Commonwealth Edison since that time. (Corey A.1419-20.)

The Government cites no other evidence to support its contention that there existed competition between Freeman and United Electric which had been eliminated, and there is none in this immense record. In view of all the evidence, the court was clearly correct in finding that "an independent United Electric would not and could not compete with Freeman to any substantial degree." (J.S. App. 61a.)

**C. Evidence From Numerous Knowledgeable Industry Representatives Confirmed That The Freeman-United Electric Combination Has Not Led And Is Not Likely To Lead To a Substantial Lessening Of Competition.**

Given the fact that the Freeman-United Electric combination was a decade old when the complaint herein was filed, the Government devoted extensive discovery efforts to the securing of opinions from both coal producers and consumers as to the effect of the combination upon them.<sup>70</sup> Such opinions were uniformly adverse to the Government, as was revealed in answers to interrogatories, in the depositions, and at trial.<sup>71</sup>

The Government admitted in its answers to defendants' interrogatories that it had "no information" as to any competitor who had been or would be "adversely affected or disadvantaged in its ability to compete" or any customer who had been or would be "deprived of actual" or "potential competition" by reason of the combination. (DX 46, pp. 8, 11, A.Ex.302-03, 305.) To the contrary, the Government interrogatory answers identified three companies which had declared that they had not and would not be adversely affected. Significantly, the only coal producer called as a witness by the Government was highly critical of the Government's efforts and objectives in the litigation. (Hopper A.1507-09.)

<sup>70</sup> See, e.g., DX 46 (pp.8-9), A.Ex.302-03; DX 66, A.Ex.580; DX 73, A.Ex.599; DX 77, A.Ex.607; GX 101.

<sup>71</sup> See, generally, DPF 431-441, A.1005-09. This is analogous to what transpired in *United States v. Tidewater Marine Service, Inc.*, 284 F.Supp. 324, 340 (E.D. La. 1968): "[O]ne of the questions on the interview form used for the survey conducted by the government was whether the merger would affect the business of the firm interviewed; yet the Government was unable to introduce even one statement from a competitor indicating that the merger would have an adverse effect on his business."

The Government also admitted there was testimony in the record concerning the competitive implications of the combination from large, medium size and small public utilities, a rural electric cooperative, a federal electric authority, a retail coal dealer and several industrial concerns. (GRF, p. 225). This testimony from a broad cross-section of consumers and subjected to Government cross-examination was, without exception, supportive of the proof that the long-standing affiliation of Freeman-United Electric had not had, and was not likely to have, any adverse effect on competition.

This evidence was properly considered by the District Court. As the Government has stated in other cases, the testimony of industry experts about the actual competitive situation in the industry "is an invaluable and time honored mode of evidence in antitrust cases where the effect on competition is an issue." See *United States v. Pabst Brewing Co.*, 233 F. Supp. 475, 478-79 (E.D. Wis. 1964), quoting the Government's trial brief in that case.

We are mindful of this Court's admonition in *United States v. Philadelphia National Bank*, 374 U.S. 321, 367 (1963), that industry testimony is entitled to little weight if the witnesses fail "to give concrete reasons for their conclusions." Accordingly, it is important to demonstrate that each of these witnesses in *this case* was able to do so.

Before expressing their conclusions as to the effect upon them of the Freeman-United Electric combination, the producer and consumer witnesses testified at length concerning the factors that governed their opinions. These included the role in the marketplace played by vigorous interfuel competition;<sup>73</sup> the impact on coal consumption of

<sup>73</sup> Wood A.1188; Steele A.1265-68; Gamble A.1344-47; Davis A. 1199-1200, 1202-03; Moser A.1389-90, 1402-03; Corey A.1406-07;

the increasing concern with air pollution;<sup>73</sup> the important role played by transportation factors and coal quality characteristics in determining the markets that mines in any Freight Rate District are able to serve;<sup>74</sup> United Electric's lack of coal reserves necessary to compete for future long term utility contracts;<sup>75</sup> and the fact that United Electric and Freeman had long been predominantly complementary rather than competitive companies.<sup>76</sup>

Tomey A.1107-08, 1132; Hill A.1296-97; Morrison A.598-601, 608; Abrahamson A.663-64, 673-74; Gaunt A.587-88; Ward A.559-60; Schotters A.639-40, 643-44, 648; Nicosin A.520-22; Beck A.433; Stiehl A.542-44; King A.410; DX 36, A.Ex.263; DX 67, A.Ex.582; DX 71, A.Ex.591; DX 72, A.Ex.594; DX 74, A.Ex.600; DX 75, A.Ex.603; DX 78, A.Ex.608; DX 90, pp.7, 9, center insert, A.Ex.872, 874, 876-79; DX 93, A.Ex.889; DX 95-96, A.Ex.907-08; DX 99-100, A.Ex.911-12; DX 146, p.8, A.Ex.1101; DX 147, p.13, A.Ex.1102; DX 148, p.6, A.Ex.1103; DX 149, pp.3, 12-13, A.Ex.1104-06; DX 230, 242, A.Ex.1244, 1291.

<sup>73</sup> Tomey A.1130; Steele A.1267-68, 1271; Wood A.1175-76, 1190-91; Davis A.1199-1200, 1207-08; Moser A.1389-91; Corey A.1414-16; Hill A.1313; Gamble A.1350-51; Schotters A.642-43; Petersen A.368-71; Morrison A.607-08; Ward A.560; Redard A.570-71; Nicosin A.522; Beck A.433-34; Stiehl A.541-42; King A.410-11; DX 71, A.Ex.591; DX 90, center insert, A.Ex.876-79; DX 91, A.Ex.884; DX 92, A.Ex.886; DX 97, A.Ex.909; DX 100, A.Ex.912; DX 149, pp.3, 18, A.Ex.1104; DX 154, A.Ex.1124; DX 160, A.Ex.1138; DX 161, A.Ex.1139; DX 162, A.Ex.1141; DX 163, A.Ex.1143; DX 176, A.Ex.1158; DX 178-79, A.Ex.1160-61; DX 234, pp.6-7, A.Ex.1266-67; DX 238, A.Ex.1278; DX 239, A.Ex.1279.

<sup>74</sup> Wood A.1176-78, 1194; Steele A.1265-67, 1269, 1280; Moser A.1386-89, 1394-96; Tomey A.1109-12, 1128-29; Davis A.1200-02, 1204-05; Hill A.1298-99, 1301-03, 1310-11; Gaunt A.577-78, 585-87; Ward A.550-51, 555-60; Redard A.571-73; Schotters A.638-39, 643-44; Morrison A.603-05, 612; Nicosin A.518-20, 522-28, 530-32; Beck A.431-32, 444-45; Stiehl A.538-40; King A.404-05, 409; Petersen A.367-69; Nix A.419-24; DX 69, A.Ex.588; DX 74, p.3, A.Ex.602; DX 76, A.Ex.604; DX 77, A.Ex.607; DX 158, A.Ex.1136; DX 230, A.Ex.1244; DX 231, A.Ex.1245; Beck Dep.Ex.1, A.Ex.1411.

<sup>75</sup> Wood A.1177-79, 1191-94; Steele A.1274-75, 1278-79; Moser A.1391, 1399; Tomey A.1112-13, 1116; Davis A.1204-05, 1224-25; DX 26, A.Ex.249; DX 77, A.Ex.607.

<sup>76</sup> Wood A.1178-79; Davis A.1204-05, 1214-15, 1224-25; Tomey A.1124; Hill A.1297-99, 1302-03; DX 66, A.Ex.580; DX 104, A.Ex.998; DX 105, A.Ex.999.

The Government's lone attempt to establish that these industry witnesses were indifferent to, and unsophisticated about, the competitive implications of mergers of coal producers, occurred during the cross-examination of A. H. Davis, President of Central Illinois Light Company. This elicited the fact that Mr. Davis had, in the past, taken the initiative in complaining to the Department of Justice when his evaluation led him to conclude that another merger between two coal producers *did* pose a threat to competition:

"Q. Would you be concerned, Mr. Davis, as President of CILCO, if UEC and Freeman merged with Truax-Traer?

"A. As your Department undoubtedly knows, we made a complaint several years ago about the merger of two coal companies in our area, and you have reached a satisfactory settlement, I take it, with those two companies, so anything that we feel reduces the amount of competition in our area, we are certainly not that bashful about making a complaint. If Truax-Traer were to merge with, say, Peabody in our area, we'd make another complaint.

"Q. Why would that bother you, Mr. Davis?

"A. It's a reduction of competition in our area."  
(Davis A.1222-23.)

In view of the virtual census in the record, of the very consumers on whose behalf this action was purportedly brought, regarding the effect of the Freeman-United Electric combination upon them, the trial court properly concluded that "evidence from numerous knowledgeable industry representatives, including competitors and customers of United Electric and Freeman, *confirms* the defendants' contention that the challenged combination has not led, and is not likely to lead to a substantial lessening of competition." (J.S. App. 65a.)

#### D. There Remains No Other Justification For the Government's Complaint.

The Government has failed to explain why it waited until 1967 to challenge an affiliation that had its inception, and was disclosed, in 1954; nor has it explained why the Anti-trust Division upon receiving specific information concerning the combination in 1960 expressed no concern and took no action.<sup>77</sup> In the interim, no customer or competitor has come forward to support the Government's case, and a distinguished trial judge after an extensive trial has rejected it. Freeman-United Electric has been a fact of record since 1959, and the Government has failed to show in what fashion the substantial threat to competition they claim to see has become "evident." Far from threatening "to ripen into a prohibited effect," *United States v. duPont & Co.*, 353 U.S. 586, 597 (1957), this longstanding affiliation never has, does not now, and never can threaten competition. We suggest, therefore, that defendants should be permitted to go their way. See *United States v. U. S. Steel Corp.*, 251 U.S. 417, 452-53 (1920); *United States v. Kryptok Co.*, 11 F.2d 874, 875 (S.D.N.Y. 1925); *United States v. Inter-Island Steam Nav. Co.*, 87 F.Supp. 1010, 1023 (D. Haw. 1950).

The Freeman-United Electric combination is totally unlike any of the acquisitions successfully attacked by the Government years after consummation. Thus, in *duPont*, *supra*, the course of events during the years between the stock acquisitions and the filing of the complaint had served to increase the likelihood of an adverse effect on competition.<sup>78</sup> With Freeman-United Electric, however, the increasing interfuel competition, heightened environmental con-

<sup>77</sup> J.S. App. 8a. The details of this investigation are set forth in DPF 132-33, A.921-22.

<sup>78</sup> During this time, General Motors had increased in size and duPont's sales to GM had grown substantially, as had the "potency" of duPont's stock interest. 353 U.S. at 599, 607 n. 36.

cerns, growth of utilities, and the like, during the intervening years have made it all the clearer that the combination can have no such effect.

Similarly, in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), the two companies were in sound condition at the time of trial and their separation would restore competition where there had been none for many years. Conversely, *here* the court specifically found that in view of United Electric's inability to be a competitive factor in the future, divestiture would not benefit competition. (J.S. App. 66a.)

Apart from the Government's futile claim that United Electric and Freeman could be competitors, and the easily rebutted conclusion it would force from the structural data presented (discussed below), the Government's Brief in this Court cites no other support for its claim that the Freeman-United Electric combination has resulted in any lessening of competition during the many years of its existence.

In their post-trial papers, the Government did request a finding that the combination was likely to cause the coal industry to be less responsive to changes in consumer demands. (GPF, p. 46.) However, this finding was rejected by the trial court on the basis of ample evidence. As the court found, "the past performance of the industry suggests that there has been intensive competition among coal producers." (J.S. App. 18a.)<sup>79</sup> In fact, the Government conceded that it "has never asserted that during the 20 years preceding 1967, the coal industry was noncompetitive," and it also admitted that the price of coal at the mine mouth as of 1968 was actually less than it was at the begin-

<sup>79</sup> See, generally, DPF 138-166, A.923-30; Steiner A.792, 1582-84; Steiner Dep. Ex.2, ¶3, A.Ex.1829-30.

ning of the postwar period. (GRF, pp.39-40.) The Government also acknowledged that there had been marked improvements in coal technology and techniques, that there had been a relatively constant increase in productivity from 1947 to 1967, and that during that period the f.o.b. mine price of coal had remained relatively stable despite general inflation in wholesale prices. *Ibid.*

Given these admissions and the evidence in the record, the court was virtually compelled to conclude, as it did, that the case was "devoid of any signs of anticompetitive performance." (J.S. App. 18a.)

## II.

### **THE DISTRICT COURT COMMITTED NO ERROR IN DECLINING TO DECIDE THE CASE SOLELY UPON THE STRUCTURAL DATA SUBMITTED BY THE GOVERNMENT.**

In the absence of any ground for challenging the documented *factual* findings of the trial court, the Government struggles to find a *legal* issue in regard to the subsidiary questions of market definition, asserting error in the refusal of the District Court to dispose of the case solely on the basis of the Government's structural data. The failure of the Government's case, however, was that it could not show an adverse competitive effect in *any* line of commerce in *any* section of the country—the trial court specifically holding in this regard that there would be no Section 7 violation "even were this court to accept the Government's unrealistic product and geographic market definitions." (J.S. App. 66a; see also J.S. App. 59a-60a.) Thus, the outcome below would have been no different had the market definition questions been resolved in the way the Government wished. In any event, the District Court properly analyzed the markets in-

volved and properly rejected the Government's structural data as controlling of the outcome of the case.

**A. The Decision Below Did Not Turn On The Subsidiary Questions of Market Definition.**

As is clear from its opinion, the District Court's resolution of the subsidiary questions of market definition were not controlling of the ultimate issues in this case. Therefore, the questions raised by the Government concerning the court's choice of product and geographic markets are not material.

This Court has made it clear that in an action under Section 7, an "examination of the particular market—its structure, history and probable future" is necessary to "provide the appropriate setting for judging the probable anti-competitive effect of the merger." *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n. 38 (1962). It was on the basis of precisely such an examination, involving a careful assessment of "all of the evidence" (J.S. App. 2a, 18a, 53a, 64a, 66a), that the District Court concluded that the challenged combination did not offend Section 7.

Significantly, not one of the many factors considered by the court in reaching its decision hinged upon resolution of the questions of market definition. These questions were thus in no sense critical to the outcome, and the court specifically held that the United Electric-Freeman affiliation would not violate Section 7 "even were this court to accept the Government's unrealistic product and geographic market definitions." (J.S. App. 66a; see also J.S. App. 59a-60a.) In so holding, the court acknowledged (J.S. App. 60a) this Court's teaching in *Pabst* that questions of market definition are "entirely subsidiary to the *crucial question* in this and every § 7 case which is whether a merger may

substantially lessen competition. . . ." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549-50 (1966).

It is important to recognize that the District Court did not use the relevant product and geographic markets which it adopted as the key to the denominator for a simplistic mathematical test. To the contrary, it rejected a mechanistic approach and focused instead on the "crucial question" of the combination's competitive effects.

Accordingly, the trial court's choice of energy rather than coal as the appropriate *product* market *was not* the predicate for a finding that the challenged combination supplied an insubstantial share of energy resources consumed in the Midwest. It was designed instead to make it clear that the court had given full recognition to the intense competitive pressures from alternative fuels which, the court concluded on the basis of substantial evidence (see J.S. App. 27a-53a), were "crucially relevant to its assessment of the competitive effect of the United Electric-Freeman combination." (J.S. App. 53a.)

Neither was the District Court's *geographic* market definition a prelude to an exculpating finding of permissible market share. Rather, it was intended to facilitate an identification of areas or customers to scrutinize for the alleged anticompetitive effect (J.S. App. 57a), and to facilitate an understanding of why the Government's market share statistics were not a reliable guide to determining the level of competition in the industry. (J.S. App. 57a-60a; 62a; 65a-66a.)

Thus, as the Government itself recognizes (Gov't. Brief, p. 33 n. 21), the court's product and geographic markets were chosen not to foreclose examination of the *coal* industry in the *Midwest*, but rather because they helped to "explain a great deal of what has happened in the *coal* industry and to

*its markets.*" (J.S. App. 52a-53a; see also J.S. App. 57a-59a.) Conversely, what the Government would have is a market definition operating as an exclusionary rule of evidence. They would ask the trial court to blind itself to factors outside the coal industry that very definitely affect the level of competition within it; and they would seek protection of their market share statistics from analysis that might show them to be misleading or meaningless.<sup>80</sup>

In any event, whether it is technically correct to designate the relevant product market energy or coal, there can be no escaping the hard facts of record with respect to the "crucially relevant" pressures on coal producers such as United Electric-Freeman arising from the vigorous interfuel competition existing in the marketplace, the bargaining power that such competition gives consumers, and the impact of environmental controls on coal's rivalry with other fuels.

The same is true of the geographic markets adopted by the court: whether United Electric and Freeman are said to serve different areas within a market or different markets, "viewed in the context of all the evidence in this case . . . an independent United Electric would not and could not compete with Freeman to any substantial degree." (J.S. App. 61a.) This finds parallel in *United States v. Crocker-Anglo Nat'l Bank*, 277 F.Supp. 133 (N.D. Cal. 1967) where

<sup>80</sup> The approach followed by the court below finds parallel in *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 71 (10th Cir. 1972) ("it seems reasonable to consider . . . the competition that exists between coal and other fuels"); *United States v. Connecticut Nat'l Bank*, 5 Trade Reg. Rep. (1973 Trade Cas.) ¶74,577 at 94,546 (D. Conn. 1973) ("influences of the New York bank require serious consideration and analysis when the Court considers the remaining crucial issues in the case, i.e., the impact of the merger on competition"); and *United States v. First Nat'l Bank of Md.*, 310 F.Supp. 157, 168 (D. Md. 1970) ("non-commercial bank activities can be taken into account in connection with the effect of the merger upon commercial banking as the line of commerce in the given market").

the court rejected the contention that there was a state-wide banking market but found that, even if there were, there was no Section 7 violation in light of the insubstantial competitive overlap between the merging companies. 277 F.Supp. at 169-73, 177-78.

The court's own discussion of the likely competitive effects of the combination (J.S. App. 60a-64a) makes clear that *none* of its findings with respect to concentration, competitive overlap, types of mining, types of coal, Commonwealth Edison, United Electric's inability to serve Chicago, United Electric's "singularly unpromising" coal reserve prospects and the like were dependent upon the market definitions chosen by the court or would have been different had the markets urged by the Government been adopted.<sup>21</sup>

In light of the economic and commercial realities found to exist by the trial court on the basis of substantial evidence, it is clear that the decision below would have been no different had the subsidiary technicalities of market definition been resolved according to the Government's wishes. The assertions by the Government that the Court's opinion "reflects no analysis of the structure of the coal submarket or of the impact upon it of the Freeman-United Electric combination" and "no discussion of the effect of the combination on competition within the sections of the country proposed by the Government" (Gov't. Brief, pp. 32 n.20, 50 n.36) are flatly wrong. The entire opinion constitutes precisely such an "analysis" and "discussion." Accordingly,

<sup>21</sup> In *Brown Shoe, supra*, this Court declined to consider whether the District Court had been correct in rejecting certain proposed market definitions where such markets, even if proper, would not "aid us in analyzing the effects of this merger" and where the appellant could "point to no advantage it would enjoy" even if the markets in question were used in lieu of those employed by the district court. 370 U.S. at 327.

while defendants submit that the court's rulings on market definition were correct, it is clear that even if the markets had been defined as the Government asked, the outcome would have been the same.

**B. The District Court Correctly Rejected The Market Definitions Urged By The Government.**

*The Product Market.* There was nothing either factually or legally novel in the District Court's examination of the likely competitive effects of the United Electric-Freeman merger within the framework of an energy market. Indeed, the Federal Trade Commission recently sent to Congress a report by its Bureau of Economics on interfuel substitutability (focusing largely on utility consumers) which finds that the results of its study support the conclusion that "an energy market exists." FEDERAL TRADE COMMISSION STAFF REPORT, INTERFUEL SUBSTITUTABILITY IN THE ELECTRIC UTILITY SECTOR OF THE U.S. ECONOMY 115 (1972). The purpose of the report was to analyze the extent of interfuel substitution "in order to establish the product boundaries between the various energy sources." *Id.* at 2. In doing so, it confirmed that coal, gas and nuclear energy trade in a "single market," and that "the primary fuels are generally good substitutes for one another." *Id.* at 115-16.

In his dissenting opinion in the Court of Appeals stage in the *Tampa Electric* litigation, Judge Weick was similarly persuaded that:

"there exists such a degree of cross-elasticity between coal and other boiler fuels as to constitute boiler fuels the relevant line of commerce in this case. Each of the boiler fuels—coal, oil, gas and atomic energy—is utilized in the same manner to produce the same result.

As each is consumed power is produced to drive the generators which in turn produce electric energy."<sup>23</sup>

Numerous other cases have recognized the reality of inter-fuel competition. See, e.g., *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Fuels Research Council, Inc. v. Federal Power Commission*, 374 F.2d 842, 845, 850, 852-54 (7th Cir. 1967); *National Coal Association v. Federal Power Commission*, 247 F.2d 86 (D.C. Cir. 1957); *Mississippi River Transmission Corp. and United Gas Pipe Line Co.*, 41 FPC 555 (1969); *Natural Gas Pipeline Co. of America v. New York Central RR. Co.*, 323 ICC 75 (1964); and *Natural Gas Pipeline Co. of America*, 28 FPC 731 (1962).

Similarly, in this case, the District Court determined the "competitive battle waged by various forms of energy" to have been "documented in this litigation." (J.S. App. 55a.) Coal was found to have the same uses as the alternative fuels with which it competes (J.S. App. 27a), the same customers (J.S. App. 29a-40a), a high degree of sensitivity to price changes of other fuels (J.S. App. 13a, 28a-29a, 36a-39a, 43a-44a, 51a-52a), and was viewed as an integral part of the energy market by the public, industry, and Government itself. (J.S. App. 13a-14a, 29a, 31a-32a.)

To combat these commercial realities, the Government catalogues the differences between coal and other forms of energy. (Gov't. Brief, pp. 21-31.) To be sure, there are coal trade associations, labor unions, and publications; admittedly, coal looks different from gas, oil and uranium and is mined and prepared in a different way. But the fact that an

<sup>23</sup> *Tampa Electric Co. v. Nashville Coal Co.*, 276 F.2d 766, 780 (6th Cir. 1960), *rev'd*, 365 U.S. 320 (1961). In its reversal of the majority opinion, this Court found it unnecessary to decide whether boiler fuels, rather than coal alone, was the appropriate line of commerce. 365 U.S. at 328-30. But see *Brown Shoe Co. v. United States*, 379 U.S. 294, 330 (1962).

oil derrick is of no use in a coal mine, or that coal is black and uranium yellow, are all distinctions without a difference and contribute nothing to the determination of whether there is interfuel competition.<sup>82</sup> And the statement that "[c]oal's dominance . . . is not likely to disappear soon" (Gov't. Brief, p. 27) means nothing more than that the competitive battle among various forms of energy is not yet over.

While the Government's Brief adopts an essentially mechanical approach to the considerations suggested in *Brown Shoe*<sup>84</sup> for determining submarkets, the cases make clear that in determining the appropriate line of commerce, legalisms are no substitute for examination of the economic and commercial realities involved. The opinion in *Brown Shoe* itself notes that "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal legalistic one." 370 U.S. at 336. This Court has also pointed out with reference to *Brown Shoe* that:

"Concededly, these guidelines offer no precise formula for judgment and they necessitate rather than avoid, careful consideration based upon the entire record." *United States v. Continental Can Co.*, 378 U.S. 441, 449 (1964).

Both before and after *Brown Shoe* the cases acknowledge the principle that "the boundaries of the relevant market

<sup>82</sup> As far as price differences in raw fuel are concerned, the trial court recognized that, "the choice between competing fuels depends not only on delivered price, but on such matters as relative thermal efficiencies and differences in capital costs of burning equipment as well. The costs of storing, handling, and in some instances, disposing of the fuel by-products or residue, for example, are economic factors which can make a low-cost fuel the most expensive fuel . . . . In some areas, operating considerations, such as air pollution control regulations, may require a premium priced fuel and foreclose consideration of others." (J.S. App. 28a-29a.)

<sup>84</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

must be drawn with sufficient breadth . . . to recognize competition where, in fact, competition exists." 370 U.S. at 326. See *United States v. Continental Can Co.*, 378 U.S. 441, 457 (1964); *United States v. duPont & Co.*, 351 U.S. 377, 404 (1956); *United States v. Connecticut Nat'l Bank*, *supra* note 80, ¶74,577 at 94,544; *United States v. Columbia Pictures Corp.*, 189 F.Supp. 153, 185 (S.D.N.Y. 1960).<sup>85</sup>

The Government would fault the District Court's reading of *United States v. Continental Can Co.*, 378 U.S. 441 (1964). (Gov't. Brief, pp. 33-35.) Chief Judge Robson, however, construed the decision (which involved only whether the Government had made out a *prima facie* case) in precisely the same manner as Justice Goldberg in his concurring opinion. That is to say, that the relevant product market was a *question of fact* in each case, and that "upon remand it will be open to the defendants not only to rebut the *prima facie* inference that metal and glass containers may be considered together as a line of commerce but also to prove that plastic or other containers in fact compete with metal and glass to such an extent that as a matter of 'competitive reality' they must be considered as part of the determinative line of commerce." 378 U.S. at 466.

What the Government really despairs of, however, is not that the District Court adopted the wrong line of commerce, but that it did not decide the "crucial" question in the litigation solely on improperly aggregated coal production statistics. As is discussed below, the court properly refused to do so and declined to view the case as a numbers game. If, for example, the Court's conclusion had focused

<sup>85</sup> The decision in *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) announces no different rule. Insulated aluminum conductor was found to be a submarket because there was not a sufficient degree of competitiveness between that product and insulated copper conductor. 377 U.S. at 276-77.

on defendant's *de minimus* share of energy markets, the Government's quarrel with the trial court's product market might have some substance. Since, however, that was decidedly not the rationale below, the Government's arguments on the line of commerce issue, and the issue itself, have no significance.

*The Geographic Markets.* Upon the issue of the relevant geographic market, there is and was no dispute among the parties concerning the proper legal standard: appropriate sections of the country must "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe Co. v. United States*, *supra*, 370 U.S. at 336-37.<sup>86</sup> But while the Government claims that each of the two geographic markets it proposed "corresponds to the competitive realities of the coal industry" (Gov't. Brief, p. 37), the trial court properly decided this factual issue against them:

"The Government's proposed geographic markets, Illinois and the Eastern Interior Coal Province, are based essentially on past and present production statistics and do not relate to actual coal consumption patterns. The Government failed to produce evidence to establish the existence of a market for coal within these two proffered geographic areas." (J.S. App. 56a.)

The evidence overwhelmingly supported these findings.<sup>87</sup>

<sup>86</sup> Accord: *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 456 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967); *United States v. Connecticut Nat'l Bank*, *supra*, [74,577 at 94,544]; *United States v. Northwest Industries, Inc.*, 301 F.Supp. 1066, 1083-84 (N.D. Ill. 1969); *United States v. Tidewater Marine Service, Inc.*, 284 F.Supp. 324, 332 (E.D. La. 1968); *United States v. Crocker-Anglo National Bank*, 277 F.Supp. 133, 173 (N.D. Cal. 1967); and *United States v. Kimberly-Clark Corp.*, 264 F.Supp. 439, 457 (N.D. Cal. 1967).

<sup>87</sup> Significantly, the Government's Brief is searched in vain for a claim that either Illinois or the so-called Province sales area is a

The Government's failure to prove the existence of either an Illinois or an "Eastern Interior Coal Province sales area" market for coal was mainly at the hands of its own trial economist, James Folsom. On direct examination, under cross-examination, and when questioned by the court, Mr. Folsom confessed he had "problems" with the Government's suggestion of the "Province sales area" as a market—principally because of its failure to take account of the important role which transportation costs play in determining where coal from any given mine can be sold. He could also not explain why certain areas had been included within the "Province sales area" and others excluded. (Folsom A.1689-90, 1701, 1711-12.) The following examination of Mr. Folsom by Government counsel is illustrative:

"Q. I hand you what has been received into evidence as Government's Exhibit 52, which is a chart entitled "1967 Sales of Coal in the Eastern Interior Coal Province Sales Area by Coal Producers Located in Illinois, Producing District No. 10; Indiana, Producing District No. 11; and Western Kentucky, Producing District No. 9."

"I ask you to examine this exhibit, sir, and on the basis of the exhibit to tell us your opinion as to the validity of the Government's choice of the Eastern Interior Coal Province sales area as one of the relevant economic markets in this lawsuit."

"A. I do not believe that this exhibit will stand alone—I do not believe standing alone it will justify seeing the Eastern Interior Coal Province Sales Area

"market". The Government does observe that the province constitutes a "producing area," that *production* figures are published for the province, that the "region is geologically united, and underlain by a coal-bearing sequence of rock," and that "Illinois has more coal resources than any other State." (Gov't. Brief, p. 38-39 and n. 22.) However, these factors hardly bear on the question of whether these areas constitute *markets*.

as a market. It gives you some basis for this, in that the percentages of production sold within the area, production by the companies in the Eastern Interior Coal Province, is fairly substantial in terms of their sales within the area; *but you have to have the testimony from the people about the fact that they buy coal all over this area, et cetera, to justify saying this is an economic market.*" (Folsom A.1711-12.)

There was, of course, no such testimony and the court so found. (J.S. App. 65a.)<sup>88</sup>

Similarly, there was no evidence supporting the existence of an Illinois market for coal and the Government admitted that no industry witnesses testified to its existence. (GRF, p.188.) As the court observed (J.S. App. 56a), while Mr. Folsom had "concluded that the State of Illinois was the most appropriate market" (Folsom A.1689-90), he never explained why and could name no factor that made the state's political boundaries a meaningful measure of the relevant geographic market for coal. (*Id.* at 1697-98.)<sup>89</sup> Defendants did show, however, that use of Illinois as a market was particularly inappropriate since 70 percent of Freeman's Southern Illinois production was shipped out of state, and, excluding shipments to Edison, less than 38 percent of its *total* 1967 production was shipped to consumers in Illinois. *Freeman Response To Government Questionnaire.*<sup>90</sup>

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<sup>88</sup> This presents a factual situation identical to that in *United States v. Crocker-Anglo Nat'l. Bank*, 277 F.Supp. 133, 170 (N.D. Calif. 1967) where the Court noted that the Government could not identify any customer in a state-wide banking market.

<sup>89</sup> Mr. Folsom also testified that using the Mississippi and/or Ohio Rivers (which also define the boundaries of Illinois) made no sense as dividing lines in determining a coal market. Tr. 2538-39.

<sup>90</sup> Indeed, even the Bureau of Mines economist who prepared the statistics used by the Government recognized that the market areas in which coal can be sold are determined by Freight Rate Districts and not by state boundaries. He testified that his statistics did not

The Government's consumption statistics with respect to Illinois and the "Province sales area" (Gov't. Brief, pp. 39, 40) also failed to support the claim that these were markets. The fact that 82 percent of the coal consumed in Illinois is produced in Illinois no more demonstrates that it is a market than the fact that 100 percent of the coal sold in the western hemisphere is produced there indicates that there is a western hemisphere coal market. While such data may indicate that the market is no larger than the area in question, it plainly provides no insight as to whether the area is itself a market.<sup>91</sup>

The Government does not, because it cannot, effectively deal with the fact that its proposed markets have no relation to the "actual coal consumption patterns" that are dictated by considerations of transportation cost. (J.S. App. 56a-57a.) Coal is, of course, a transportation intensive commodity. This Court has long been aware that "[a] difference of a few cents per ton in the transportation charge is normally sufficient to divert a coal contract from one mine to another." *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 586 (1949). It is not surprising, then, that the District Court found the "evidence clearly indicates that transportation costs largely determine those facilities for whose business coal mines are able to compete and those

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deal with specific markets and conceded that "anyone with even a minimum amount of knowledge of the coal industry" knows that consumers in the Fulton-Peoria area, for example, cannot be sold coal from Southern Illinois on a competitive basis. (Gallagher A. 320-22.)

<sup>91</sup> The shortcoming of the Government's market delineation procedure in drafting its complaint was simply that it was incomplete. Had the Government carried its own technique one step further, it would have found, as did the trial court, that the ICC-designated Freight Rate Districts in which the mines of United Electric and Freeman were located serve "separate and distinct" marketing areas. (J.S. App. 57a-59a, 62a.)

mines to which coal consumers can practicably turn for supplies." (J.S. App. 57a; see also J.S. App. 19a-20a.)<sup>92</sup>

Finally, the Government's argument that "there may be more than one relevant section of the country" (Gov't. Brief, p. 44) avails it nothing. Other relevant geographic markets, if there are any, still have to correspond to "commercial realities" and those urged by the Government did not. As the court observed, "[r]esponses to the subpoena questionnaire [which the District Court had ordered] sent to mid-west coal consumers demonstrated that each Freight Rate District serves a distinct and definable area, as did the testimony of producers and consumers." (J.S. App. 57a.) This evidence showed that distribution patterns of coal were dictated not by political boundaries, but by transportation costs, coal quality characteristics<sup>92a</sup> and Freight Rate Districts. (J.S. App. 57a; Steiner A.1602-15; see, generally, DPF 283-88, A.963-65; DPF 309-45, A.970-79.)

The Government's attempt to obfuscate the "commercial realities" of actual coal distribution patterns fails. First,

<sup>92</sup> The Government's reliance (Gov't. Brief, p. 43) on *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), is misplaced. The fact that coal producers in a number of states might effectively compete for the business of a customer located in Florida—far removed from any coal production and thus offering no significant shipping cost advantage to producers in a single area—has absolutely no bearing on the question whether a coal producer located in one Illinois Freight Rate District can successfully compete with a producer in another Illinois Freight Rate District for customers whose location gives the latter producer a very substantial shipping cost advantage. In the present case, involving just such cost advantages, the trial court found that disadvantaged producers could not compete.

<sup>92a</sup> The simple fact is that coal is not, as the Government urged below, a fungible commodity which can be sold anywhere. Coal varies considerably in such characteristics as sulphur content, ash content, moisture content, ash softening temperature, BTU rating and the like. Because boiler equipment is custom-designed, such characteristics are among the important factors which determine from which mines a consumer can practicably buy coal. See gen-

such patterns are not based on rail rates alone (Gov't. Brief, pp. 45-46), but upon all relevant costs, as the opinion and evidence demonstrate. The fact that defendants' markets were not "contiguous" (Gov't. Brief, pp. 47) is of no consequence; we are aware of no legal or economic theory, and none is cited, that holds that markets must be "contiguous" if there are more than one. Further, the claim that defendants' markets were based on only one year's sales data (Gov't. Brief, p. 48) overlooks the facts that (1) the markets revealed were supported by the testimony of consumers and producers;<sup>93</sup> (2) the markets were also tested against sales data collected by the Government;<sup>94</sup> (3) the purchase of coal under long-term contracts, as well as the rigidity of transportation rates, tends to "fix" distribution patterns for years;<sup>95</sup> and (4) since sales data for 1965

erally, DPF 289-96, A.965-67. While the Government advised the trial court that "[o]ur position is that coal is coal . . .", it can only have been embarrassed when one of its own employees readily conceded during deposition that the Government itself would never "order coal without regard to its characteristics." (Compare Transcript of Pre-trial Conference of February 19, 1969, p.6 with Nix A.423-24.) Indeed, the Government's official solicitation form for coal bids specifically provides that whenever the offered coal is not in conformance with specifications it "shall be rejected as being non-responsive." (Burton Dep.Ex.1, p.6, A.Ex.1413.)

<sup>93</sup> Davis A.1199-1202, 1205; Sherwood A.1375; Moser A.1386, 1389, 1394; Wood A.1176-78; Tomey A.1110-12; Steele A.1266-67, 1280; Tarzy A.271-72; Hill A.1298-99, 1303, 1306; Morris A.1072-74, 1079, 1151-53; Nugent A.1517-19; Redard A.570-73; King A.403-04, 409; Beck A.431-32; Morrison A.602-04, 606-07; Abrahamson A.652-55; Petersen A.367-69, 374-75, 377-78; Nicosin A.527-28; Tarzy A.256-57, 270-71.

<sup>94</sup> The Government sent a questionnaire to virtually every Midwest coal producer seeking information as to the destination of all coal shipments for 1965, 1966 and 1967. Defendants checked their analysis of markets against this sales data collected by the Government for 1967. The results were essentially identical. Compare DX 55 with DX 56, A.Ex.462, 481.

<sup>95</sup> To illustrate, DX 57, A.Ex.506, is a chart prepared in 1960 showing utility use of coal in that year according to Freight Rate

and 1966 were available to the Government, they could easily have shown 1967 data to be unreliable if that had been the case.<sup>98</sup>

Finally, the Government attempts to disparage these actual coal distribution patterns by calling them a "patchwork" and a "crazy-quilt" and claiming that, while they are "purportedly" based on actual areas served, they "do not reflect the way coal is marketed." (Gov't. Brief, pp. 44, 45, 47.) This overlooks that (1) these patterns are based on the responses of virtually every significant consumer of coal in the Midwest to a subpoena questionnaire issued by the District Court in a form agreed to by the Government, and (2) the accuracy of all of this data was *stipulated* in advance of trial, including the fact that "[i]n 1967, approximately 97 percent of the production in the Fulton-Peoria Freight Rate District, 100 percent of the production in the Springfield Freight Rate District and 98 percent of the production in the Belleville Freight Rate District and 85 percent of the production in the Southern Illinois Freight Rate District, was shipped to one or more of [these] market areas . . . ." (DX 49(a), A.Ex.345; DPF 316-20, 323-27, 330-34, 337-42, A.972-78.)

In any event, the trial court's finding that "[t]he Freight Rate Districts in which the mines and reserves of United Electric are located serve separate and distinct markets from those in which the mines of Freeman are located" (J.S. App. 62a) was addressed not so much to the subsidiary legal question of the appropriate "section of the country," but to what the facts of record showed with respect to the marketing of coal. Whether it is technically correct to say that United Electric and Freeman serve separate

districts. The pattern shown in that year is virtually identical to that revealed by defendants for 1967.

<sup>98</sup> See note 94, *supra*, and DPF 47-48, A.899.

markets within a "section of the country" or to say that they serve separate "sections of the country," there can be no denying that "United Electric would not and could not compete with Freeman to any substantial degree." (J.S. App. 61a.)<sup>\*\*\*</sup>

**C. The Government's Structural Data Was Not A Fair Measure Of The Competitive Impact Of The Combination.**

In their post trial brief at page 8, the Government asserted that "the chief function of the market delineation is to identify an area within which sales percentages can be relied upon for substantial guidance in measuring the impact of the merger on competition." Under the factual circumstances in this case, however, and consistent with prior decisions of this Court, the District Court very properly rejected the Government's simplistic structural approach.

At the outset, it should be observed that by repeatedly referring to the question of the establishment of a *prima facie* case in connection with its structural data (Gov't. Brief, pp. 17, 51, 52, 53, 57, 58, 64), the Government confuses the true posture of the case before this Court. Unlike *United States v. Continental Can Co.*, 378 U.S. 441 (1964), and *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), the District Court below did not dismiss the complaint at the close of the Government's case on the ground that it had failed to carry its initial burden of proof. In contrast, the question for review here is whether the findings of the court below, after a full trial, are "clearly erroneous." *United States v. du Pont & Co.*, 351 U.S. 377, 381 (1956); *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); Fed. R. Civ. P. 52(a). The Government's seeming unwillingness to

<sup>\*\*\*</sup> See again, *United States v. Crocker-Anglo Nat'l Bank*, 277 F.Supp. 133, 169-73, 177-78 (N.D. Cal. 1967) (discussed at pages 51-52, *supra*).

address itself to this question—while perhaps understandable in view of the comprehensiveness of the record and the District Court's conscientious analysis of it—cannot alter that fact.

Nor is this case like *United States v. Philadelphia National Bank*, 374 U.S. 321, 366 (1963), where this Court found "nothing in the record . . . to rebut the inherently anti-competitive tendency" of the merger. After two years of pre-trial discovery and a month-long trial, creating a record that included more than 10,000 pages of exhibits and more than 7,500 pages of testimony, the trial court had more than ample support for its conclusion that the Government's structural case could not be sustained.

In addition to the weakened significance of the Government's structural data brought about by aggregating such statistics in "economically unrealistic markets," (J.S. App. 65a)<sup>98b</sup> other key factors interdicted use of such data as an accurate measure of the competitive impact of the combination in *any* line of commerce, in *any* section of the country. These were as follows:

1. The most significant deficiency in the Government's statistical case was the total disregard of the "key factor in a coal producer's market strength—coal reserves." (J.S. App. 65a.) As we have discussed above, the level of verifiable, substantial and uncommitted coal reserves is vastly more determinative of a supplier's ability to compete than past or current production levels. An analysis of the market that takes no note, on the one hand, of United Electric's enfeebled reserve position and, on the other, of Humble's competitive importance after acquiring more than 3 billion tons of deep reserves in Illinois, just cannot be considered

<sup>98b</sup> In addition, while the Government concedes that metallurgical coal and steam coal do not compete (GRF, p.8; DX 46, p.35, A.Ex.329), its production statistics do not reflect this.

a full and accurate measure of competition in any market. The Government's statistics ignore Humble simply because it hadn't yet started production.

2. The Government's structural data was also deficient in that it failed to take into account the nature of the customers for whose business coal companies compete. Where, as here, the customers in a given market are technologically sophisticated, make it standard practice to buy only after careful investigation of the sellers, and possess the formidable bargaining power of the large-scale, long-term purchaser, production data simply cannot accurately reflect the competitive strength of the sellers in the market. Undeniably, the freedom of action possessed by sellers in such a market is totally different from that existing in a market of powerful sellers and small, weak purchasers.

The instant case thus contrasts sharply with those previously before this Court involving seller-dominated industries and markets in which the consumer wielded virtually no power. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) involved the retail grocery market; *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) concerned the beer market; and in *United States v. Philadelphia National Bank*, 374 U.S. 321, 369-370 (1963), this Court was concerned with the small businessman's lack of power in the commercial banking market. In the markets in which the defendants in the present case compete, on the other hand, tremendous power is wielded by customers.

3. The Government's production statistics suffered from the further deficiency of ignoring the pervasive changes that have occurred in the coal industry over the past quarter century. As the trial court stated in the course of its in-depth analysis:

"The effect of the changes since World War II in the patterns of coal consumption and marketing, in labor costs, in mining technology, in productivity, in coal preparation procedures and in transportation costs has been to enhance the economies of scale production and to greatly increase capital requirements. This, in turn, has led to an increase in the size of mines." (J.S. App. 16a.)

"[T]he innovations in the coal industry that have made coal prices competitive with other forms of energy have created the need for large scale production and, thus, for large companies. Experts for both the Government and the defendants agreed that under these circumstances, increase in the size of coal mining companies and the concentration of more production in fewer mines, as well as more output of a given mine devoted to a particular source, have been economically inevitable." (J.S. App. 24a.)

In recent years, the coal industry has lost to other fuels its transportation market, its spaceheating market, and its dominant position in the industrial markets; the utility market has emerged as the principal market for coal. (J.S. App. 11a-12a.) As we have discussed above, in order to compete successfully for utility customers under the long-term contractual arrangement that is now generally required, successful coal producers have necessarily grown in size.

Both the defendants' and the Government's economic experts agreed that it was the disappearance of domestic and railroad markets, as a direct result of interfuel competition, coupled with the rise of long-term contracts, that was responsible for the withdrawal and disappearance of smaller coal producers. (Steiner A.1576, 1619-20; Folsom A.1706.) As the court found, from the testimony of a number of witnesses, "small producers are, for all practical pur-

poses, in a 'different business.'" (J.S. App. 17a and n.18; see, generally, DPF 159-64, A.928-30.)

Moreover, the evidence showed that apart from the activities of Peabody Coal Company there was no trend toward concentration. It was seen that, excluding Peabody, the production shares of the two, four, and ten largest producers had, since 1959, remained stable or declined,<sup>97</sup> and that the United Electric-Freeman combination "accounted for less of the coal produced in Illinois and the three-state area in 1967 than it did in 1959." (J.S.App. 60a.) Whether or not the Government is correct in its assertion that "the effects of an increasingly concentrated market structure are not mitigated merely because the increases are caused chiefly by a single company" (Gov't. Brief p. 56), the assertion is irrelevant; the Government's consent decree with that single company (Peabody) has cured and nullified those effects to the Government's satisfaction. As for the future, deconcentration will continue as Humble Oil opens a mine with an output of 3 million tons per year and Peabody divests itself of an operation annually producing 6 million tons. Furthermore, the Government will surely prosecute and prevent any truly anticompetitive coal or interfuel merger.

4. Finally, the inadequacy of the Government's structural approach to the case at bar was further demonstrated by the Government's action during the negotiating of the consent decree in the *Peabody* case. The Antitrust Division went on record there (DX 37, A.Ex.264) that it would approve "without reservation" a merger of the Midland operation (which Peabody had consented to sell) and Zeigler Coal and Coke Company. This combination would have been structurally indistinguishable from United Electric-Freeman, with the resulting combination in either situation constitut-

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<sup>97</sup> GX 64, A.Ex.83; GX 72, A.Ex.91; GX 77, A.Ex.96; GX 85, A.Ex.98; DX 237, A.Ex.1274; Steiner A.1615-21.

ing the second largest coal producer in Illinois and the Midwest. The Government's willingness to approve a Zeigler-Midland merger "without reservation" casts doubt on both the seriousness and the substance of its contention that anti-competitive effects will follow from a continuation of the United Electric-Freeman affiliation. Significantly, when he was asked to make a competitive assessment of Zeigler-Midland following a simplistic structural approach, the Government's economist at trial balked, stating, "I would still want more information. I would still want to look further." (Folsom A.1709).<sup>98</sup>

In view of all the evidence, the trial court very properly concluded that "continuation of the affiliation between United Electric and Freeman is not adverse to competition, nor would divestiture benefit competition even were this court to accept the Government's unrealistic product and geographic market definitions." (J.S. App. 65a-66a.)

### III.

#### **THE FOURTH QUESTION PRESENTED BY THE GOVERNMENT IS UNTIMELY, INCONSISTENT AND WITHOUT MERIT.**

The argument developed by the Government under its fourth Question Presented (Gov't. Brief, pp. 2, 19-20, 63-

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<sup>98</sup> As we pointed out in the Motion to Affirm, the Government cannot satisfactorily explain its inconsistent and irreconcilable actions. We have here not a case where the Government has merely taken no action on the one hand, while bringing suit on the other. Rather, it is a unique situation where the Antitrust Division has taken *affirmative* and contradictory action with respect to structurally identical mergers, approving the creation of one "without reservation" while simultaneously seeking to dissolve another that has existed for more than a decade. Recognizing the questionable nature of such action, the Chief of the Antitrust Division's Chicago office has stated on the record that he has "some sympathy with the defendants [United Electric-Freeman] in the Zeigler (cont.)

74) raises the claim that the District Court erred in not invoking this Court's teachings with respect to the "failing company" defense.<sup>99</sup> Preliminarily, it should be observed that the Government's apparent full retreat from its earlier request for an examination of the evidentiary support for the District Court's conclusions regarding United Electric's future, and a determination whether United Electric's potential had been "cut off" in 1959, speaks convincingly to what the trial record shows on those issues. (J.S. Questions 3 and 4 and pp. 20-24; Gov't. Brief, p. 2 n.1.)

As for the late-arriving claim that the District Court viewed United Electric's competitive viability under erroneous legal standards and at the wrong point in time, this is a contrived afterthought at odds not only with the record but with the Government's own position throughout the six years of this litigation. Indeed, all that the Government's new argument demonstrates is the desperate nature of its attempt to find *some* means, however strained and bizarre, to avoid the overwhelming record evidence showing that the challenged combination does not run afoul of Section 7.

The Government's naked assertions (Gov't. Brief, pp. 20, 70-74) that there is a deficiency in the record with respect to United Electric's condition and prospects in 1959 and 1967 are nonsense.<sup>100</sup> The Government's suggestion (without

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matter." (Transcript of Pre-trial conference of October 3, 1969, p. 10, A.872.) The Zeigler-Midland affair is discussed in detail in Defendants' Proposed Findings 449-56, A.1011-14.

<sup>99</sup> We respectfully submit that the Government in injecting issues not presented in its Jurisdictional Statement has violated Rule 40(1)(d)(2) of this Court, and this portion of the Government's brief should properly be disregarded.

<sup>100</sup> Because of the last minute nature of its present argument, the Government has apparently not had time to decide whether it believes the District Court should have judged United Electric's state as of 1959 or as of 1967. (See Govt. Brief, pp. 19, 20, 71, 73.)

benefit of record citation) that, left to itself, United Electric "would have vigorously pursued a policy of obtaining additional reserves to enable it to continue its substantial business as its existing reserves were depleted" (Gov't. Brief, pp. 73-74) is a pipe dream.

As the Principal Geologist of the State of Illinois put it in 1967: "So intense has been the interest in the more favorably situated strippable reserves, that I do not know of any prime acreage that is not now under control." (DX 34, A.Ex.259.) This paralleled the assessment, *again in 1967*, of Paul Weir Company that "there are not available for purchase from non-operating owners a sufficient number of adjoining tracts that when assembled would amount to strippable coal reserves over 10 million tons." (DX 87, attached letter, p. 3, A.Ex.793.)

Nor was this strip reserve scarcity a recent phenomenon in 1967. To the contrary, the evidence was that "*by 1960*, there was no longer any possibility of acquiring or establishing, for transfer to coal producers, of any new economically mineable strip coal acreage in the Illinois basin of sufficient size to justify the opening of new mines." (DX 88, A.Ex.796; see also DX 87, p. 27, A.Ex.779. ) That such was the situation throughout the 1960's was common knowledge. As Mr. Nugent explained in his 1968 deposition, the unavailability of Midwest strip reserves was known to virtually everyone in the utility, mining equipment and coal industries—"down to cub engineers who have just been in the business a couple of years." (Nugent A.62.)<sup>101</sup>

<sup>101</sup> See pages 18 to 19, *supra*. As the Government knows full well, the court's observation that there was no evidence that "reserves are *presently* available," (J.S. App.63a; emphasis, the court's) was not intended to contrast United Electric's condition and prospects at trial with those obtaining in 1959. Rather, it was responsive to the Government's speculations at trial—repeated in its Jurisdictional Statement (J.S. 23-24) and here (Gov't. Brief, pp. 10, 13, 66,

That an independent United Electric could not have acquired the strip reserves needed to prolong its competitive life is further confirmed by the unsuccessful efforts to acquire such reserves made by Amalgamated in the 1950's and Humble in the 1960's. (Dorrance A.394; Stipulated Testimony of George H. Shipley, A.848.)

Finally, United Electric's own efforts, immediately following the merger and continuing thereafter, place the question beyond doubt. Prior to 1959, United Electric had not built properly for its future. It had no "real" land department, its competitors had far better prospecting organizations, and it had taken up only 7 of more than 200 fields of coal reserves its employees had examined; some of the best of these were dropped without investigation.<sup>102</sup> Frank Kolbe, the company's former President, defended United Electric's coal reserve policy during this time on the basis that the company had other uses for its money and that he did not care to tie up money for coal fields that would not be mined for a long time in the future.<sup>103</sup>

Once control of United Electric was gained in 1959 by Freeman, United Electric made a vigorous but unsuccessful effort to purchase additional coal reserves.<sup>104</sup> It was

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73)—that mining conditions have changed in the past, that they may continue to change, and that "properties which UEC has investigated in the past . . . may become economically strippable in the future." (Gov't. Post-Trial Brief, p. 141; see also Def. Post-Trial Brief, pp. 88-89.)

<sup>102</sup> See, generally, DPF 84-91, 126-29, A.908-10, 919-21; Kolbe Dep. Ex. Y, p.3, A.Ex.1648; Morris A.1061-64; Latimer A.297-98, 310-19; Nugent A.66; Kolbe Dep. Ex. N, A.Ex.1629; DX 13, A.Ex. 224; Inman A.198-99.

<sup>103</sup> Kolbe A.141-42, 144-45, 149-50, 179-80.

<sup>104</sup> See, generally, DPF 92-99, A.910-12; Ames A.1450; Thorson A.1169-70, 1261; Nugent A.66-68, 1525-27; Morris A.1162; Inman A.212-13; Camicia A.88-90, 95-97, 1357-58, 1363-64, 1368-70; Hopper A.1498-1500; DX 113, pp.4080, 4086, 4138, 4196, A.Ex.1029-30, 1032, 1035.

made clear to the company's management that all of the money necessary would be made available for their acquisition,<sup>105</sup> and Robert Inman, United Electric's Vice President of Operations, testified (A.211) that he had an "open book" with respect to such expenditures. In their search for additional reserves, United Electric's personnel were given extremely wide latitude and were not limited to the acquisition of reserves with a potential of immediate commercial development only. (Nugent A.70-71; Camicia A.1369.) As the Government admitted, United Electric investigated many strip-coal areas throughout Illinois, Indiana, and Kentucky, but these efforts were unsuccessful. (DPF 95-96, A.911; GRF, p. 16.) The Government also admitted that "after 1959, UEC's management sought to acquire economically recoverable reserves, i.e., reserves which were merchantable and capable of making a profit." (GRF, p. 15.)

The evidence was equally clear that United Electric's inability to undertake deep mining had nothing to do with whether it had remained independent or whether that reading is taken in 1959, 1967, or any other date. Long before the merger United Electric had repeatedly stressed that strip mining was its business and that deep mining was not.<sup>106</sup> And witness after witness attested to the fact that United Electric would have been unable successfully to undertake deep mining.<sup>107</sup> As the Paul Weir Company summed up the situation: "While it is, of course, impossible to state for certain whether or not United Electric would even have attempted to undertake deep mining, it is improbable that they could have done so successfully, and, there-

<sup>105</sup> Nugent A.70; DX 113, pp.4080, 4086, 4138, 4196, A.Ex.1029-30, 1032, 1035; Camicia A.1363-64; Morris A.1162.

<sup>106</sup> See pages 22 to 23, *supra*.

<sup>107</sup> See pages 24 to 28, *supra*.

fore, highly unlikely that they would have tried." (DX 87, pp.29-30, A.Ex.781-82.)

The trial court's opinion makes plain that its analysis of the challenged combination was not confined narrowly to the time of trial. Rather it encompassed a full review of *all* the evidence on *all* the likely competitive consequences of the Freeman-United Electric affiliation—from its inception through the trial date and beyond. As the court below summarized the results of its two-year review of the record before it:

"The challenged combination has been in effect *since 1959*, and yet no adverse consequences with respect to competition were shown either *to have occurred* or *likely to occur*." (J.S. App. 64a)<sup>108</sup>

It is incredible that the Government would fault the District Court for a supposed failure to make more findings with respect to United Electric's 1959 and 1967 prospects. The Government's claim *in this Court* that such findings are the key to the case is in sharp contrast with its claim *in the court below* that such findings were "irrelevant."

The Government *here* criticizes the trial court, for example, for the lack of specific findings showing that United Electric had "no alternative way of preserving its existence." (Gov't. Brief, p. 70.) But *below* it urged against making such findings. It asked the trial court to reject Defendants' Proposed Finding 426 (A.1003), stating that

<sup>108</sup> Time and again the trial court specifically addressed itself to a consideration of the evidence over the years. For example, "the combination is in its *second decade* without demonstrating any of the indicia of concentration" (J.S. App. 60a); "[t]he mines and coal reserves of United Electric are, and have been since prior to 1959, located in different Freight Rate Districts than the mines and coal reserves of Freeman" (J.S. App. 62a); and "[t]hese companies have been and are now predominantly complementary in nature." (J.S. App. 61a.)

"[i]t would not be possible for [United Electric] to enter into deep mining by acquiring a small deep mining company," on the ground that these facts of record were "irrelevant." (GRF, p.218.) Similarly, Defendants' Proposed Findings 116 through 123 (A.917-18), reviewing the evidence that "during the 1950's [United Electric] recognized the need to stem its deteriorating competitive position and that a merger was the only realistic way available to achieve this," were summarily "objected to as irrelevant." (GRF, p.22.)<sup>109</sup>

Viewed in retrospect, the Government's newly concocted argument hardly merits consideration. Indeed, criticism of the trial court's primary concern with events in the period immediately preceding and surrounding the trial comes with particularly ill grace when one considers that these were "the years chosen by the Government for analysis." (J.S. App. 62a.) Thus, the principal focus of the complaint is on 1965 to 1967 (Complaint, ¶ 11-20, A.12-14); the Government's alleged common customer charts were confined to the years 1965-67 (GX 88-91, A.Ex.107-17); all of the Government's concentration and market share charts combined United Electric and Freeman data only in 1967 and subsequent years (GX 73, 86, A.Ex.92, 100; compare GX 71, A.Ex.90, with GX 72, A.Ex. 91; and GX 84 with GX 85, A.Ex.98); and the Government advised the trial court that its coal industry rebuttal witnesses would be called to testify as to "the *availability* of strip and underground coal reserves" and "*future* strip mining possibilities." (Gov't. Counsel, A.1355.)

<sup>109</sup> The Government neglects to mention the District Court's finding that "[t]he evidence shows that United Electric had earlier [before the 1959 combination] made unsuccessful attempts to merge with, or to acquire, other Illinois coal producers." (J.S. App. 8a n.7.)

In any event, the Government's disquisition on the "failing company" doctrine is beside the point. The facts of record with respect to United Electric's liquidating nature—whenever viewed—do not constitute, as the Government would have it, an attempt to "justify an otherwise illegal merger." (Gov't. Brief, p. 64.) United Electric was not acquired by "one of its largest competitors" (Gov't. Brief, p. 70), but by Freeman—a firm which the District Court found, on the basis of all of the evidence in this case, "would not and could not" compete with an independent United Electric to any substantial degree. (J.S. App. 61a; see also J.S. App. 65a.) In view of the vigorous competition which United Electric-Freeman faces from other coal producers and suppliers of other fuels, the essentially complementary nature of the combination, and the bargaining power of large and sophisticated utilities, it is clear that this affiliation neither has had nor can have any adverse competitive impact.

In sum, the events which decreed that United Electric would reach the end of its competitive significance in the 1960's took place long prior to that date, and the evidence since then has demonstrated beyond cavil that United Electric was not capable of being "preserved"—by anyone. Unable in the end to overcome the weight of this evidence, the Government concludes its brief by asking this Court to reverse the District Court's factual findings—not on the basis of the record—but with an incredible plea for "judicial notice." (Gov't. Brief, pp. 73-74.)

**CONCLUSION**

The decision below comports completely with settled principles of merger law and policy, and signals no softening of, or retreat from, established barriers to anticompetitive mergers. It merely represents "the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others." *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949). That judgment should be affirmed.

Respectfully submitted,

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